in switching, and that after the first year the cost would be $250,000 per year (Tr. 2-114). This estimate was based (Tr. 2-114) upon 40 minutes' delay on each run, on the number of runs involved and the application of a flat figure of $10.00 per run in added expense (Tr. 2-114).

Appellee's testimony showed that the delay would average 11 minutes per run; that the initial cost of new cabooses would be $44,000 per year and the extra annual expense in wages about $62,000, but this estimate did not include anything except wages (Tr. 2-123).

The Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes (Tr. 13).

The undisputed evidence showed that if cabooses were attached to these runs the cabooses would be used only by one employee out of five on each run and by that employe for only from one-sixth to one-eighth of the time that he worked, and that during the balance of his working period he would be exposed to the same hazards, and in fact additional hazards. The Supreme Court of the State of Illinois in its opinion (Tr. 7 to 26) substantially found the facts as stated herein.

On March 16, 1942, the Supreme Court of the State of Illinois passed not only upon the one question decided by the Circuit Court of St. Clair County, but as it had a right to do under the decision of *People* v. *Bradford*, 372 Ill. 63, l. c. 65, 66, passed on the other questions involved in the case, and handed down an opinion reversing the judgment of the Circuit Court and remanding the cause to the Circuit Court, with directions to confirm the order of the Commission. A true copy of said opinion is attached hereto and made a part hereof. The opinion of the Supreme Court of the State of Illinois is officially reported in 379 Ill. 403.

Appellant, within the time provided by law, filed a petition for rehearing in the Supreme Court of Illinois, which said petition for rehearing was by the Supreme Court of

the State of Illinois denied on May 12, 1942 (Tr. page 24) whereupon the said judgment of the Supreme Court of the State of Illinois became a final judgment of that Court. The Supreme Court of Illinois is the highest court of the State of Illinois in which a decision in this suit could be had.

Hereafter, as provided by the Rules of the Supreme Court of the United States, under another heading, we shall set forth the substantial federal questions involved in this appeal, and shall demonstrate that they are substantial and were properly drawn in question in the Supreme Court of Illinois.

Statutory Provisions Sustaining Jurisdiction of Supreme Court of the United States.

The Supreme Court of the United States has jurisdiction of this cause under the Judicial Code, Sec. 237 as amended (28 U. S. C. A., 344), which provides:

> (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ. * * *
>
> (c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the

papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed:"

Secs. 861a and 861b of the United States Code (28 U. S. C. A. Supp.) provide for the substitution of appeal for writ of error, as provided in Sec. 237 of the Judicial Code. These sections are as follows:

"861a. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

"861b. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

Decisions of the Supreme Court of the United States holding that an order of a commission is in effect a statute of the State for jurisdictional purposes on appeal.

While the statute of the United States provides only for a direct appeal to the Supreme Court of the United States where there is drawn in question the validity of a statute of a State on the ground of its being repugnant to the Constitution, etc., of the United States, yet the Supreme Court of the United States had held that an order of a State commission, being legislative in its nature and made by an instrumentality of the State, is a State law within the meaning of the Constitution of the United States and the laws thereof regulating the jurisdiction of the Supreme Court.

This question arose in the case of *Lake Erie & Western R. R. Co.* v. *State Public Utilities Com. of Illinois, ex rel.*

Cameron, 249 U. S. 422, which was an appeal from the State Public Utilities Commission of Illinois, the predecessor body of the Illinois Commerce Commission. The appeal in that case was from a judgment of the Supreme Court of Illinois, affirming the order of the Circuit Court which had affirmed the order of the old Public Utilities Commission. The question was raised in the Supreme Court of the United States that such an order of the Illinois Commission did not constitute a statute of the State of Illinois within the meaning of Sec. 237 of the Judicial Code. In holding to the contrary, the Supreme Court of the United States said, l.c. 424:

> "Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction. Grand Trunk Western Ry. Co. *v.* Railroad Commission of Indiana, 221 U. S. 400, 403; Ross *v.* Oregon, 227 U. S. 150, 162-163; Home Telephone & Telegraph Co. *v.* Los Angeles, 227 U. S. 278, 295-296; Atlantic Coast Line R. R. Co. *v.* Goldsboro, 232 U. S. 548, 555; Wadley Southern Ry. Co. *v.* Georgia, 235 U. S. 651, 660-661; Arkadelphia Milling Co. *v.* St. Louis Southwestern Ry. Co., 249 U. S. 134."

In *Live Oak Water Users' Assn.* v. *R. R. Com. of Cal.*, 269 U. S. 354, the Supreme Court of the United States held that a rate-fixing order made by a State commission acting under a State statute is for jurisdictional purposes, in applying Sec. 237 of the Judicial Code, an Act of the State legislature.

Statutes of Illinois, Validity of Which Is Involved.

Under the preceding heading we have shown that for jurisdictional purposes the order of the Illinois Commerce Commission is a statute of the State of Illinois, and that its validity is involved in this proceeding. However, such order

of the Commission purports to have been issued by virtue of a statute of Illinois entitled: "An Act concerning public utilities", approved June 29, 1921, in force July 1, 1921, the same being Chap. 111⅔ of the Illinois Revised Statutes 1941, and appearing in that statute on pages 2492 to 2524, inclusive. In general, the Act creates a Commission known as the Illinois Commerce Commission, consisting of five members, with rather full and plenary jurisdiction over all public utilities.

Appellees claim that the jurisdiction of the Illinois Commerce Commission of the matter involved arises under and by virtue of Sec. 32 (Ill. Rev. Stat. 1941, p. 2503); Sec. 50 (Ill. Rev. Stat. 1941, p. 2508), and Sec. 60 (Ill. Rev. Stat. 1941, p. 2512) of the Illinois Commerce Commission Act. These sections are as follows:

> "32. All rates or other charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or for any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. Any public utility, with the consent and approval of the Commission, may as a basis for the determination of the charges made by it classify its service according to the amount used, the time when used, the purpose for which used, and other relevant factors.
>
> Every public utility shall furnish, provide and maintain such service instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and public and as shall be in all respects adequate, just and reasonable.
>
> All rules and regulations made by a public utility affecting or pertaining to its charge or service to the public shall be just and reasonable."

"50. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or any two or more public utilities ought reasonably to be made or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the Commission has ordered to be erected, require joint action by two or more public utilities, the Commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the Commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured."

"60. The Commission, or any commissioner, assistant commissioner, or officer of the Commission designated by the Commission, shall have power to hold

investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or an officer of the Commission shall invalidate any order, decision rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

Each commissioner, each assistant commissioner, the secretary of the Commission, and every officer of the Commission designated by it to hold any inquiry, investigation or hearing, shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, compel the attendance and testimony of witnesses, and the production of papers, books, accounts and documents.

Hearings shall be held either by the Commission or by one or more commissioners, or assistant commissioners. All evidence presented at hearings held by the Commission or under its authority shall become a part of the records of the Commission. In all cases in which the Commission bases any action on reports of investigation or inquiries not conducted as hearings, such reports shall be made a part of the records of the Commission."

Appellant has from the ontset and consistently claimed that no such jurisdiction existed in the Commission because of the provision of Sec. 90 of the Illinois Commerce Commission Act (Ill. Rev. Stat. 1941, p. 2524), which provides as follows:

"90. Neither this Act nor any provision thereof shall apply or be construed to apply to commerce with

foreign nations or commerce among the several states of this union, except when specifically so stated, and insofar as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress, and the decisions of the Supreme Court of the United States."

In addition, Sec. 66 of the Act (Ill. Rev. Stat. 1941, p. 2513) provides for process to secure the attendance of witnesses; Sec. 64 of the Act (Ill. Rev. Stat. 1941, p. 2513) provides for complaints by the Commission on its own motion or by any other person or organization, and for notice of hearing on such complaints; Sec. 65 (Ill. Rev. Stat. 1941, p. 2514) provides for hearing and issuance of orders; Sec. 66 (Ill. Rev. Stat. 1941, p. 2514) provides for service of orders on the parties concerned; Sec. 71 (Ill. Rev. Stat. 1941, p. 2515) provides for filing of petitions for rehearing and contains a requirement that the Commission pass on the same, and Sec. 68 (Ill. Rev. Stat. 1941, p. 2515) provides for appeals to the Circuit Courts and for appeals from Circuit Courts to the Supreme Court of the State.

A true copy of the order of the Commission and the dissenting opinion of Commissioner Olson are attached hereto and made a part hereof.

Date of Judgment and Application for Appeal.

The date of the judgment sought to be reversed is March 16, 1942, and such judgment became final on May 12, 1942, when the Supreme Court of Illinois denied appellant's petition for rehearing.

Application for appeal to the Supreme Court of the United States from said judgment of the Supreme Court of Illinois was presented June 11, 1942.

Stage At Which the Federal Questions Were Raised.

In its written answer filed with the Illinois Commerce Commission, appellant raised for the first time and at the first opportunity the question of the jurisdiction of the Commission over all or any of the runs described in the petition and herein. After denying the allegations of the petition, in paragraph 3 of its answer (Tr. 2-24), it said:

> "it expressly denies that this Honorable Commission has any power, right or jurisdiction to enter any order in regard to the subject matter of this complaint so far as any movements in interstate commerce are concerned."

And in paragraph 6 of its answer (Tr. 2-24), it averred as follows:

> "6. For further answer to the complaint this respondent expressly says that so far as interstate movements of trains or cuts of cars are concerned, this Commission has no power, jurisdiction or authority to enter any order requiring cabooses upon interstate runs between the State of Illinois and the State of Missouri, and this respondent expressly raises said question of jurisdiction of the Commission so far as any interstate runs or movements are concerned."

At the first hearing of the case (Tr. 4—2), appellant specifically raised the question of the jurisdiction of the Commission over the runs involved in interstate commerce, and during the course of the objection, the point was specifically raised by motion and objection that the Commission had no jurisdiction over either the bridge runs or the inter-yard runs in Illinois. The following occurred, as disclosed by Tr. 4—3-5:

> "Mr. Campbell: Well, that would be regulating interstate commerce, too, and this Commission would have no jurisdiction to enter any order covering the move-

ment from one state to another, which it would be, across the Eads Bridge and the Merchants Bridge.

Mr. Schwarzbach: I am not asking for any movement into Missouri at all; the movement was only to the Illinois side of this particular bridge.

Mr. Campbell: I think, if the Examiner please, we have reached a point in this case, not only as to this point, but I also expect to raise the same point as to any cuts containing interstate commerce, that is commerce among the various states. I think we have reached a legal question which should be decided before we proceed any further.

Examiner Daley: Let's get off the record for a time and see what we can do.

(Whereupon a discussion was had out of the record.)

Examiner Nyka: In view of the fact that we cannot reach any agreement, we might as well go ahead and then we will rule at the proper time.

Mr. Schwarzbach: For the purpose of the record, Mr. Examiner please, I would like to call your attention to paragraph 51 on pages 42, 43 and 44 which specifically gives this Commission jurisdiction to handle, fix and establish switching rules and regulations and so forth, and our case comes specifically within that paragraph. Will you go ahead now, Mr. Jenkins?

Mr. Campbell: Well, now, for the record, I want to make this specific objection as to the two bridges, and I also want to raise the question that this Commission has no jurisdiction over any of the movements that contain cars being transported in interstate commerce, even though the movements be within the State of Illinois. I want to get that clear in the record, because I do not want to delay matters by objecting all the time. I want my views in both instances in the record.

Examiner Daley: They will probably come up from time to time, and they will be sufficiently clarified as we go along.

Mr. Abram: You want it understood that there is a general objection all the way through.

Mr. Campbell: Yes.

Mr. Abram: All right.

Mr. Campbell: I want it clearly understood that I am making the two distinctions, one as to the actual movement over the bridges and the other as to movement from one point in Illinois to another point in Illinois, but containing cars being transported in interstate commerce.

Mr. Schwarzbach: We have no objection to that general objection.

Examiner Nyka: All right."

Furthermore (Tr. 4—5-6), the following occurred:

"Q. In your opinion, would it be possible to put crossovers on these bridges in the State of Illinois?

Mr. Campbell: I object to that; there couldn't be any duty, in addition to the other objections, to taking a caboose to the middle of the river and then put it over on another main track and leave it there to obstruct traffic while they went over to St. Louis and back or vice versa.

Examiner Nyka: What was the question?

(Question read.)

Mr. Schwarzbach: I might say, in answer to Mr. Campbell, if the Commission finds that this endangers the lives of these switchmen or some of the employes, they certainly would have a right to order the railroad to put these crossovers there if they find it necessary. I think it is entirely within the province of the Commission.

Mr. Abraham: In that event a caboose could be switched within the boundaries of Illinois and it would not necessarily have to go across the river. It would provide railroad facilities for cutting off the caboose and confining it strictly to the Illinois boundary line.

Examiner Nyka: He may answer. Objection overruled."

Furthermore, in the order of the Commission (Tr. 2—3), the Commission recites the facts as follows:

> "On June 29, 1939, respondent filed its brief on the question of jurisdiction. On July 15, 1939, complainant filed its brief in answer to the brief filed by respondent. On August 4, 1939, respondent filed a brief in reply to said brief filed by complainant."

Again the record shows the following (Tr. 4—15-17):

> "After objection was made by Mr. Schwarzbach, as shown on Abs. p. 105, respondent, through its counsel, asked to have the ruling of the Commission on this proposition, stating it was essential, and the Assistant Commissioner stated that ruling would be reserved for the Commission. Whereupon Mr. Campbell, for respondent, made the offer shown at the top of page 105 of the abstract. Whereupon the witness Davis stated, in reply to question propounded by the Assistant Commissioner, that sixty-four passenger trains used the bridge each day. Objection was made by petitioner to the offer on the ground that it goes beyond the Illinois line. Whereupon Mr. Campbell, for the respondent, stated that the purpose was to show conditions there and to follow it up with testimony to show that it would be wholly impracticable, if an order were entered, for a caboose from the middle of the river to any place in Illinois or from any place in Illinois to the middle of the river, to comply with that order without affecting interstate commerce. Whereupon Mr. Schwarzbach, for the petitioner, asked counsel for respondent whether he meant to say that respondent could not have a caboose go all the way across the river, to which Mr. Campbell replied that the effect of the order would be to take the caboose to the middle of the river. The Assistant Commissioner then stated that they would allow the Commission to decide the question as to whether it should go past the center of the bridge. Whereupon Mr. Campbell, for the respondent, made the offer shown (Rec. p. 391), starting about the middle of

page 105 of the abstract. Whereupon the Assistant Commissioner stated that they had no jurisdiction across the river. Whereupon Mr. Campbell stated that he wanted the evidence in the record. Whereupon the Assistant Commissioner stated that this was a question for the Commission to decide after all the evidence was in. Whereupon Mr. Campbell stated that he was asking for a ruling on it now, and asked what the Examiner's ruling was as to whether he could examine this witness on these questions. Whereupon the Assistant Commissioner sustained the objection."

After these motions and objections were made, the Commission called an informal conference of the parties with the Commission to discuss the questions of jurisdiction that had been raised. In the record appears the following (Tr. 4—19 to 22):

"June 28, 1939, an informal conference was held before the Commission on issue raised by request of complainant that inspectors of the Commission make an investigation of trans-Mississippi bridge runs of the respondent. Petitioner given leave to file brief within fifteen days and respondent given leave to reply thereto within ten days thereafter, and the issue of the inspectors making inspection of such trans-Mississippi runs taken under advisement by the Commission.

At the informal hearing before the Commission, the Acting Chairman stated that the question came up for consideration by the Commission as to whether or not the Commission had authority to have Mr. Thomas make an inspection of the trans-Mississippi runs, and to go out of the state in order to do so, Mr. Thomas stating that he would have to go outside the State of Illinois to make this investigation. That, in addition to runs in Illinois, there are runs originating in St. Louis that come over the two bridges and are delivered to these yards in East St. Louis and return to St. Louis with the cars or transfer runs, and they operate in the State of Illinois from the yards to the state line. Mr. Thomas stated that he had in mind to start his investi-

gation from the middle of the river, the state line, but he did not know how he could get off the train in the middle of the river; that to get off the trains in the middle of the river on the bridges, he would be in a position of making a request; that those are rather heavy grades and there is an operating situation there that is rather aggravated, and if such a request was made, he would not consider it in line to make a request to stop the trains—they are very heavy trains. He would have to go to St. Louis and get off of the train right at the Eads Bridge and start the investigation in Illinois, but he would have to be on the train before he arrived in Illinois. He would have to be on it after it was outside of the state. His investigation would stop at the state line, but the movements would all be movements from Illinois to Missouri, or Missouri to Illinois, interstate across one of the two bridges. That his understanding was that the runs actually originate in Missouri and come to Illinois and return from Illinois to Missouri. That they will bring a hundred cars to the yard, for instance, the same crew will take up the hundred cars and return to Missouri and in these movements they cross the Mississippi River across the bridges. The cut starts in Missouri with all the cars for Illinois, and it brings them to Illinois, and it picks up the cut from Illinois and takes them to Missouri.

Mr. Campbell then stated that, in addition to objections theretofore made to calling the witness, further objection was made that these runs are wholly interstate and that the Commission would have no jurisdiction in relation to whether cabooses were there or not, and stated that he had prepared a brief on the subject which he would be glad to file and would like to discuss it for a moment.

After Mr. Schwarzbach had stated that he had gotten a notice to appear on this date, but did not know what it was about the Acting Chairman, Mr. Hart, stated that on June 16th petitioner was notified that on June 20th, 1939, the Commission at its Springfield office would consider the issue raised. Then followed some discussion of the legal point involved. The complainant

was given permission to file a reply brief to the brief filed on the jurisdictional question by respondent.

During the discussion, Mr. Campbell, for the respondent, stated that this jurisdictional question had been raised at the first hearing of this case. Whereupon the Acting Chairman of the Commission stated that it was also raised before the Commission assigned an engineer to make the investigation.

Mr. Campbell then discussed the question of the right of the Commission to call a court witness, which was also answered by Mr. Schwarzbach.

The Commission asked for extra copies of respondent's brief and gave petitioner fifteen days within which to answer the brief.

The brief of respondent on the jurisdictional question was accompanied by brief on many other questions raised in the case. The brief covered substantially the same question as will be discussed in respondent's brief in this case.

A complete brief, consisting of thirty-nine pages, was filed by petitioner in reply to the brief of respondent and appears in full in the record.

There appears in the record in full the reply of the respondent to the brief filed by the complainant."

Furthermore, (Tr. 2—105, 106) appellant made certain offers of proof relative to the question of interstate commerce, which offers and the colloquy between counsel for appellees and appellant and the Assistant Commissioner are as follows:

"Mr. Campbell: I want to make a further offer,—that if an order were entered by this Commission, requiring a caboose from a point in Illinois to the middle of the river or from the middle of the river to a point in Illinois, it would be impossible and impracticable, with all the trains on those main tracks on the bridge, to cut off the caboose at the middle of the river; that the only practical way that order could be complied with would be to have another engine follow the train to the middle of the river, uncouple the

caboose and take it out of the way of the other train; and that if a caboose were required from the middle of the river to a point in Illinois or from a point in Illinois to the middle of the river, as a practical railroad proposition, it would require that we carry the caboose on; either put it on in Missouri on a movement to a point in Illinois, or take it to Missouri on a movement from Illinois to Missouri.

I am contending in this case, that this Commission cannot enter an order that would require a caboose on a train across the river. It has no jurisdiction in that.

Asst. Comr. Nyka: If such an order were entered, it would be up to the railroad to do what they want after they reach the center of the river.

Mr. Campbell: That is what I want to show. We can't do anything with it after carrying it to the point where the Commission has no jurisdiction to enter an order.

Asst. Comr. Nyka: The Commission has jurisdiction over the subject matter. What happens beyond the jurisdiction of the State, we are not concerned with. We don't know what ruling will be given, until all the evidence is in.

Mr. Schwarzbach: We are making a formal objection to all testimony that goes beyond the Illinois side. We will save a lot of time that way.

Asst. Comr. Nyka: The Commission will rule on that question when the time comes up for argument in the case."

All of these motions and objections on jurisdictional questions were taken under advisement by the Commission and considered by it in making its final order; and, among other things, there appears in the order of the Commission (Tr. 2—17), the following: "It is further ordered that the motion of respondent to dismiss this proceeding for want of jurisdiction be, and the same is hereby denied."

Furthermore, Commissioner Olson dissented from the

order of the Commission relative to the bridge runs and filed a written dissenting opinion, which appears in full (Tr. 2—18 to 21). It clearly shows that the jurisdictional question and the constitutional question relative to interstate commerce was not only presented to the Commission, but was considered and passed upon by it. Commissioner Olson dissented on the ground stated in his opinion—that to enter the order as to the bridge runs would cause an undue burden on interstate commerce.

Furthermore, the order of the Circuit Court of St. Clair County (Tr. 2—269, 270) shows that this jurisdictional question was considered and passed upon by the Circuit Court, and that the Circuit Court set aside the order of the Commission on the ground that it was an interference with interstate commerce and beyond the jurisdiction of the Commission.

In support of its contention that the cost of furnishing, maintaining and operating caboose cars would be so unreasonable because of the exorbitant expense required in order to comply with it, and the benefits derived therefrom would be so disproportionate to the cost thereof, as to constitute a taking of appellant's property without due process of law, in violation of the provisions of the 14th Amendment to the Constitution of the United States, it would take a hundred pages in this statement to quote the evidence offered and received relative to this subject and the objections thereto. For example, evidence was received and considered relative to the additional expense of furnishing caboose cars and the benefits accruing to the employes by reason thereof. At least half of the voluminous record is devoted to testimony on this subject.

Examples of this testimony are shown by certain exhibits, all of which were explained and amplified by extensive testimony of the witnesses identifying them.

Exhibit 5 (Tr. 4—27) shows the maximum running time allowed on certain runs. This was amended as shown by appellant's Exhibit 6.

Exhibits 7, 8 and 9 (Tr. 4—29, 30) contain other changes in running time.

Exhibit 10 (Tr. 4—30) is a tabulation of distances between the various yards in Illinois.

Exhibit 15 (Tr. 4—31) is a table showing the average monthly temperatures from January, 1927, to December, 1936.

Exhibit 16 (Tr. 4—32) shows the number of cars delivered on a typical day, viz: June 9, 1938.

Exhibit 18 (Tr. 4—32) shows the taxes paid by appellant in Illinois in 1936, amounting to more than half a million dollars.

Exhibit 19 (Tr. 4—32) shows injuries by sudden stop to switchmen in or on cabooses and cars in the rear of freight trains from 1928 to 1936, showing eight injured in cabooses, seven injured while riding cars during that period, and only one while riding on the rear end of trains.

Exhibit 20 (Tr. 4—32) shows the number of revenue cars handled by appellant for each year from 1931 to 1937, showing from 800,000 to 1,100,000 cars handled each year.

Exhibit 22 (Tr. 4—33) shows the income statement of appellant for seven years, ended December 31, 1937, showing net loss for the seven years of over $1,300,000, or an average loss for the seven years per year of over $188,000, with operating revenues for the seven years of over $50,000,000.

Exhibit 23 (Tr. 4—33) is a consolidated income statement for 1938, showing similar losses.

Exhibits 24 and 25 (Tr. 4—33) show comparative balance sheets as of July 31, 1938, and July 31, 1937, showing investments of approximately $73,000,000.

Exhibit 26 (Tr. 4—34) shows the net income or deficit of appellant for ten years, the net deficit for the ten years being nearly $1,200,000, or an average annual deficit for the ten years of nearly $120,000.

Exhibits 28 to 34 (Tr. 4—34, 35) are temperature readings.

Exhibit 35 (Tr. 4—35) is the agreement between appellant and the Bureau of Animal Industry of the United States relative to maximum time allowed for transporting livestock from different points in St. Louis and Illinois to National Stock Yards.

Exhibits 36 and 37 (Tr. 4—36, 37) are statements showing movement in and out of East St. Louis yards during a typical 24-hour period.

Exhibit 38 (Tr. 4—38, 39) shows service buildings and equipment at various parts in the yards.

Furthermore, when appellant was offering Exhibit 18, the following occurred (Tr. 4—14, 15):

> "Mr. Campbell: In view of the decision of our Supreme Court in 364 Ill. 213, and financial conditions which otherwise might be considered in a matter of this kind, to be followed up by other testimony, this merely being one of the items, I want to offer Exhibit 18 in evidence. I will prove the authenticity of it if you desire. It will be followed by substantiating testimony as to the cost to the company of what is described here.
>
> "Mr. Schwarzbach: I will make the objection that it is absolutely immaterial, in my opinion, when it comes to the question of safety. If it were a question of rate increase, it would be very material, but for the purpose of safety to the switchmen and the employes and the public, the question of cost is not material. There are a number of cases along that line.
>
> "Mr. Campbell: The Supreme Court has held if an order would impose onerous conditions, that is a fact that may be considered. We will have to follow that up with testimony.
>
> "Mr. Schwarzbach: I object very strenuously to it.

"Assistant Commissioner Nyka: Objection overruled. It may go in for consideration of the Commission. The Commission is a fact-finding body and will consider evidence as to finance. It may go in for what it is worth. It might not enter into the safety proposition, but it may be admitted for what it is worth.

"Mr. Schwarzbach: Subject to our objection?

"Assistant Commissioner Nyka: Subject to your objection."

Appellant prevailed in the Circuit Court. Appellees were the appellants in the Supreme Court of Illinois. Consequently appellant filed no assignment of errors in the Supreme Court, nor was it permitted so to do by the rules of the Supreme Court of Illinois. Neither did appellant file any cross-appeal because none was allowed or permitted. Appellant, however, did avail itself of the right it had, without filing cross-errors or a cross-appeal, to endeavor to sustain the order of the Circuit Court on any possible ground. The Circuit Court passed upon only one of appellees' contentions, and that was all it was required to pass upon. Appellant was therefore permitted to raise any point in the record that would sustain the judgment of the Circuit Court, whether the Circuit Court passed upon that contention or not. We quote from People v. Bradford, 372 Ill. 63, l.c. 65, 66, where the Supreme Court of Illinois said:

"Moreover, it was unnecessary for appellees to cross-appeal in order to save for review all the defenses interposed in their answer. The judgment appealed from was for appellees, and no part of it was adverse to them. They were, therefore, in no position to prosecute a cross-appeal. Having obtained all the relief they deemed themselves entitled to, they may sustain the judgment upon any ground warranted by the record, though they may wish to show the court below erred in not giving it to them on different or additional grounds (Bullman *v.* Cooper, 362 Ill. 469; McCaskill, Civil Practice Act Ann. 1936 (Supp.), p. 209)."

The rules of the Supreme Court of Illinois no longer provide for the filing of assignments of errors. Appellees, as a part of their brief, set forth the alleged errors relied upon for reversal, and appellant set forth its contentions as a part of its brief in the Supreme Court of Illinois. So far as the Federal questions are involved, appellant in its contentions raised in the Supreme Court of Illinois all of the Federal constitutional questions now presented. The opinion of the Supreme Court of Illinois shows (Tr. 7 to 20) that this question was raised and was considered and passed upon by the State Supreme Court.

Furthermore, the Supreme Court of Illinois considered and passed upon every Federal constitutional question now raised upon this appeal, and passed upon the same contrary to appellant's contentions that the order of the Commission was invalid and repugnant to the interstate commerce clause of the Constitution of the United States, and to the due process clause contained in the 14th Amendment thereto. Even if the questions had not been raised in the lower courts (which they were), when the Supreme Court of Illinois passed upon these Federal constitutional questions, jurisdiction was conferred by the Supreme Court of the United States to review the decision of the Supreme Court of Illinois. Some late cases in support of this point are: *Northwestern Bell Telephone Co.* v. *Nebr. St. Ry. Com.*, 297 U. S. 471, and *Whitfield* v. *State of Ohio*, 297 U. S. 431.

It is immaterial whether or not a Federal question was raised in the State trial court where questions were passed upon by State appellate courts. *Home Ins. Co.* v. *Dick*, 281 U. S. 397.

The Supreme Court of Illinois in its opinion (Tr. 10) recognized that these questions were to be determined by the Supreme Court of the United States, and said: "The question involved in this case is one of power of the Commerce Commission. The question of whether a statute of

a State or an order of the Commission acting within authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter."

Therefore, it appears conclusively that all of the Federal constitutional questions now raised on this appeal were not only raised before the Commission, the Circuit Court and in the Supreme Court of Illinois, but also all of them were definitely passed upon by the Supreme Court of Illinois and contrary to appellant's contentions, and sustaining the validity of the order of the Commission, as opposed to the grounds then and now presented.

Statement of grounds upon which it is contended that the Federal questions involved are substantial, and the way they were passed upon by the Supreme Court of Illinois, and principles and decisions under which appellant contends that the Federal questions involved are substantial.

In the Supreme Court of Illinois there was drawn in question the validity of the order of the Illinois Commerce Commission, which, as heretofore pointed out, has been held by the Supreme Court of the United States to be a State statute within the meaning of the Constitution of the United States and the Acts of Congress regulating the jurisdiction as to appeals of the Supreme Court of the United States, on the ground that the order was repugnant to the Constitution and the laws of the United States. The decision of the Supreme Court of Illinois was in favor of the validity of such order (statute) in the face of the contention of appellant that the order (statute) was invalid and repugnant to the Federal constitution, and particularly to that part of Sec. 8 of Article I relative to regulation of interstate commerce and the 14th Amendment relative to deprivation of property without due process of law. Consequently, if the

Federal questions involved are substantial, then the order of the Commission and its validity on the ground stated may be reviewed by the Supreme Court of the United States on appeal.

The validity of said order of the Illinois Commerce Commission so far as substantial Federal questions and repugnance to the Constitution of the United States are concerned, was drawn in question and considered and decided by the Supreme Court of Illinois in the following respects:

A. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois, that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz: the bridge runs, for the reason that even if Congress had not legislated upon the subject, the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic, or impairs the usefulness of facilities for such traffic; and because said order as a necessary effect compelled a like compliance in the State of Missouri where the Illinois Commerce Commission had and has no power, jurisdiction or authority. Appellant contended that such a direct burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz: Sec. 8 of Article I thereof. The Supreme Court of Illinois directly passed on this question in favor of the validity of the order of the Illinois Commerce Commission.

B. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois,

that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz: the inter-yard runs in Illinois which contained 98% of interstate freight, for the reason that even if Congress had not legislated upon the subject, the effect of the order as to such runs and resulting delays in said runs were and are a direct burden on interstate commerce and directly burdens or impedes interstate traffic, or impairs the usefulness of facilities for such traffic. Appellant contended that such a direct burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz: Sec. 8 of Article I thereof. The Supreme Court of Illinois directly passed on this question in favor of the validity of the order of the Illinois Commerce Commission.

C. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois, that Congress had taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to runs mentioned in both Findings 34 and 35, and that, inasmuch as Congress had taken charge of the field by appropriate legislation, a State cannot legislate in that field even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved, the question being whether Congress has taken possession of the field, it being immaterial then whether or not it has legislated concerning a particular matter within the field. Appellant contended that for this reason the order of the Illinois Commerce Commission was invalid on the ground that it was repugnant to the Constitution of the United States, and particularly repugnant to the interstate commerce provisions of said Constitution contained in Sec. 8 of Article I thereof.

The Supreme Court of the State of Illinois passed on this contention in favor of the validity of the order of the Illinois Commerce Commission, as against the grounds and contentions set forth, and held that the said order was not repugnant to the commerce clause of the Constitution of the United States.

D. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois that the order of the Illinois Commerce Commission as to all of the transfer runs is unreasonable because of the exorbitant expense required in order to comply with it. Appellant further contended that such expense of compliance with the order was so exorbitant, when compared with the benefits accruing therefrom, and the said benefits was so disproportionate to the cost thereof, that consequently the enforcement of the order would deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. Appellant further contended in the Supreme Court of Illinois, that, for the reasons set forth in this paragraph, the order of the Illinois Commerce Commission was invalid for the reason that it was repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto. The Supreme Court of the State of Illinois decided said contention in favor of the validity of the order of said Illinois Commerce Commission, and decided and found that such order was not repugnant to the 14th Amendment to the Constitution of the United States.

It is almost impossible literally to comply with paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States by citing pertinent quotations of specific facts of record because the opinion of the Supreme Court of Illinois is lengthy and practically every part of

it is pertinent to the facts found by the State Supreme Court. A copy of the opinion of the Supreme Court of Illinois is attached hereto and made a part of this statement, and it also appears in the transcript, pp. 7 to 20. However, we shall endeavor to comply with the rule by a summary of parts of the opinion and some pertinent quotations therefrom in order briefly to show the way the questions were passed upon by the State Supreme Court.

The State Supreme Court, after reciting the allegations of the complaint, correctly set forth (Tr. 7) the answer of appellant, as hereinbefore detailed. The Court then defined the railroad business in which appellant was engaged, recited the duties of the train crews, and particularly the duties of the one rear switchman who could use a caboose between yards, although he would be exposed to the same hazards the rest of the time; found the nature and character of the hazards that switchmen were subject to without cabooses, and showed the existence and use made of the two bridges across the Mississippi River and the inter-yard runs in Illinois. The opinion then sets up that all of the merchandise on the bridge runs is being transported in interstate commerce; and then the State Supreme Court said:

> "About sixty-eight passenger trains cross the Eads bridge each day. During the early part of each week about the same number of freight trains cross the bridge and later in the week the freight trains exceed the passenger trains in number. Approximately the same number of trains cross the Merchant's bridge each day.
>
> The Eads and Merchant's bridges span the Mississippi river between East St. Louis in Illinois and St. Louis in Missouri. Each bridge has thereon double track railroads connecting with appellee's yards. The Commerce Commission found that the boundary line

between the State of Illinois and the State of Missouri intersects the Eads bridge at a point about 1000 feet west of the west curb of Front street in the city of East St. Louis, and the Merchant's bridge about 775 feet west of the Illinois shore line when the river is at a stage of 2.4 feet." (Tr. 8).

The State Supreme Court then separated the runs as found by the Commission in Findings 34 and 35, and correctly summarized the finding and judgment of the trial court and the one question which the trial court passed upon, and held that the Circuit Court was right in setting aside the entire order when it concluded that any one part of such order was bad. The Supreme Court of Illinois then said:

"The principal question in the case concerns the validity of the order of the commission requiring cabooses for these runs over the bridge. Though the commission's order applies only to cuts of cars moving within the State, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river.

Appellants argue that notwithstanding the trains involved in order 35 are moving in interstate commerce, the attaching of cabooses thereto is not a direct burden on interstate commerce but affects it but indirectly or incidentally, and that the order lies within the inherent power of the State to enact reasonable regulations for the protection of the health, lives and safety of persons within its confines. It is urged that only when Congress has acted is the power of the States impaired, and then only to the extent that their regulations shall not be such as to be in conflict with or repugnant to the action so taken by Congress. Appellee insists that the order based upon finding No. 35 as to the bridge runs is an undue burden upon, and a regulation of, interstate commerce, in violation

of the commerce clause of the Federal constitution, and takes appellee's property without due process of law.

It is settled by decisions of the Supreme Court of the United States that a State can do nothing which will directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic. (Atlantic Coast Line Railroad Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230; Austin v. Tennessee, 179 id. 343, 45 L. ed. 224; Illinois Central Railroad Co. v. Illinois, 163 id. 142, 41 L. Ed. 107). It is equally well settled that State or local enactments, passed in the exercise of the police power of the State, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce, are valid. Minnesota Rate cases, (Simpson v. Shepard,) 230 U. S. 352, 57 L. ed. 1511, and the cases therein cited.

The question involved in this case is one of power of the Commerce Commission. The question whether a statute of the State or an order of the commission acting within the authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter." (Tr. 9, 10).

The Court then discussed the question of the right of the State under the police power to make laws promoting the peace and good order of society, for the preservation of life and health, or conducive to the comfort, convenience and welfare of the people; and then said:

"Notwithstanding acts coming within this reserve police power operate on the movements of interstate commerce and persons engaged therein, such law is nevertheless valid unless its effect is to directly lay some burden or restriction on interstate commerce which would not otherwise exist. (Hennington *v.* State of Georgia, 163 U. S. 299, 41 L. Ed. 166; Minneapolis

and St. Louis Railroad Co. *v.* Emmons, 149 Id. 364, 37 L. 769; People ex rel. Stead *v.* Chicago, Indianapolis and Louisville Railway Co., 223 Ill. 581.) Though by the Federal constitution Congress is given exclusive power to regulate commerce, the States may, in the exercise of the police power, make reasonable rules in regard to the method of carrying on interstate business within the State, such as to provide precautions that shall be used to avoid danger to those engaged in interstate commerce within the State, or to the public, or may designate facilities for the comfort of passengers and employees, safety of freight carried, and the like. The test of the validity of such enactments or orders is whether they are consistent with the general requirement that interstate commerce shall—free and unobstructed. If they are, they do not amount to a regulation of such commerce. Houston and Texas Central Railroad Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772.

The fact that a railroad may be engaged in both interstate and intrastate commerce, does not prevent a State from adopting such regulations as it may deem proper to provide for the safety of the men engaged in carrying on intrastate commerce, if such regulations are not inconsistent with or repugnant to acts of Congress adopted for the regulation of railroads engaged in interstate commerce. (Luken *v.* Lake Shore and Michigan Southern Railway Co., 248 Ill. 377; People *v.* Chicago, Indianapolis and Louisville Railway Co., supra; Missouri Pacific Railway Co. *v.* Kansas, 216 U. S. 262, 54 L. Ed. 472.) It not only lies within the power of the State, but it is its duty, to establish such regulations as are reasonable and necessary for the safety of those engaged in the business conducted within the State. The rule is settled that so long as Congress does not occupy the field of regulation to be considered in a given case, each State is empowered to make regulations within that field regarding the safety of persons engaged in interstate commerce that passes through the State. Such regulations do not purport to regulate interstate commerce, but to care for the safety of per-

sons within its borders. Chicago, Rock Island and Pacific Railway Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290" (Tr. 10, 11).

The Court then said:

> "We do not doubt the power of the Commerce Commission, delegated to it by the General Assembly under the police power, to make reasonable regulations protecting the health, safety and welfare of those engaged in appellee's switching business, so long as such regulations do not constitute an attempt to regulate, or do not directly burden interstate commerce, or run counter to Federal regulations on the subject. Appellee says these orders are attempts to regulate interstate commerce and constitute a direct burden upon such commerce and so are void for want of jurisdiction in the commission to promulgate them. It is not claimed that the Congress has specifically legislated on the subject of its use of these cabooses though it is argued that Congress has preempted the field" (Tr. 12).

It then recited that the Circuit Court did not pass upon the validity of Finding 34 of the Commission, but that inasmuch as both parties had briefed the question as to Finding 34, as well as that as to Finding 35, which involved the bridge runs, it became necessary to pass upon the validity of the order as to the runs defined in each of the findings. The Supreme Court of Illinois then said:

> "Whether either of these findings and orders of the commission are valid, depends in the main upon whether compliance with such orders lays a direct burden on interstate commerce. Where the effect of an intrastate transaction or regulation, as applied to interstate commerce, is merely indirect, the regulation producing such transaction remains within the domain of the State power" (Tr. 12, 13).

The Supreme Court held, after discussing the case of *Schechter* v. *United States*, 295 U. S. 495, as to the distinc-

tion between a direct and indirect effect or burden on interstate commerce:

"Counsel argue as to both findings No. 34 and No. 35 of the Commission's order that they are a burden on interstate commerce in that they require an additional amount of time to attach and detach these cabooses and are unreasonable in that they involve a very large additional expense to appellee, and so constitute an unwarrantable interference with interstate commerce. The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, though appellant concedes that some time is required to add a caboose to these cuts of cars. It is argued that time required to comply with this order may, at times, involve appellee in penalties for failure to comply with certain regulations governing the transportation of perishable goods and livestock. It does not appear, however, that such is a necessary result nor that such results cannot be avoided by arrangement of train schedules. We are of the opinion that the record in this case does not establish that time consumed in complying with this order is so great as to amount to a regulation of interstate commerce or a direct burden upon it. The order does not purport to do so but was obviously promulgated to protect the lives and health of citizens of this State engaged in appellee's business within the State.

As to finding No. 35, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that since there are no means of leaving a caboose at the State line, where it could be picked up on return, the only practical way in which compliance with the order of the commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within the State. This, appellee contends, is, in practical effect, a regulation of the movements

of the appellee's trains in the State of Missouri, which is beyond the power of this State or its commission" (Tr. 13, 14).

The Court then discussed the case of *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, and *Missouri Pacific R. R. Co.* v. *Norwood*, 283 U. S. 249, and attempted to distinguish the case of *A. T. & S. F. Ry.* v. *LaPrade*, 2 Fed. Supp. 855 (a three-judge court decision), and *South Covington & Cincinnati St. Ry. Co.* v. *Covington*, 235 U. S. 537, two of the cases relied upon by appellant. The Court then stated succinctly one of the issues involved, as follows:

> "Does the fact, if such be a fact, that the only practical method of complying with the order would be to haul these cabooses into Missouri, of itself render the order of the commission invalid as a direct burden upon interstate commerce?" (Tr. 17),

and discussed *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628, and *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, and then said:

> "While none of the cases cited or herein discussed are entirely analogous on the facts, we think those cases which consider State exercise of police power for the safety of citizens of the State, bear a stronger analogy to the case before us on the facts, than do those in which the laws or orders bore a closer identity with regulation of interstate traffic as such. It does not appear that this order was directed against interstate commerce, nor does it deny equal protection of the laws. On its face, it must be taken as not so directed, but as the exercise of the power and duty inherent in the State to protect its citizens. It purports on its face to apply to train movements within the State, and the fact that it does affect interstate shipments or cuts of cars crossing from this State into the State of Missouri, results, in our opinion, under the facts of this case, in an incidental effect only upon interstate commerce.

Counsel for appellee say that the carrying out of this order would involve so large an expense as to affect its efficiency in the discharge of its duties as an interstate carrier. The question of expenses of labor involved and the purchase of cabooses was one of sharp dispute in the testimony. We are of the opinion that those expenses, on this record, are to be classed with those inconveniences referred to in the cases herein cited as not affecting the power of the State to impose the regulation, unless so clearly unreasonable as to be beyond State power. This record does not so indicate" (Tr. 18, 19).

The Court then summed up its conclusions as follows (Tr. 19, 20):

"That there is substantial danger to switchmen that can be avoided by these cabooses or shelter cars, seems clear. We are of the opinion that the order of the Commerce Commission lay within the police power of the State; that such power has been delegated to that commission, to protect the lives, health and welfare of those engaged in the work of switching cars on the runs carried out by the appellee, and that it was not beyond the power of the commission to enter finding No. 35 of its order requiring cabooses to the State line for those movements which crossed the bridges, and that such regulations do not directly burden interstate commerce.

The reasons and authorities cited in determining the validity of finding and order No. 35 must apply in the main to finding and order No. 34, which requires cabooses on interyard movements within the State. Much that has already been said in the consideration of this case applies to finding and order No. 34 and need not be repeated" (Tr. 19, 20).

Summing up the conclusions of the Supreme Court of the State of Illinois, the court decided:—

1. That Congress had not taken charge of the field, viz: the matter of cabooses.

2. That inasmuch as Congress had not taken charge of the field, the State had the right to pass legislation indirectly affecting and constituting an indirect burden on interstate commerce, and that the only limitation of the right of the State was that it could not pass legislation that would result in a direct burden on interstate commerce.

3. That even with the findings as to expense and delays, and with the finding that the effect of the order as to the bridge runs was to require, as a practical proposition, compliance with the order in Missouri, such facts did not constitute a direct burden on interstate commerce, but only indirectly burdened and affected same. This applies to the bridge runs covered by Finding 35.

4. That as to the inter-yard runs in Illinois, which contained 98% interstate freight, the extra expense and the delays incident to interstate transportation constituted only an indirect burden on interstate commerce and did not create a direct burden thereon or directly affect the same.

5. That the expense of compliance with the order was not so exorbitant, when compared with the benefits accruing therefrom, and the said benefits were not so disproportionate to the cost thereof, as to deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

6. That the order, because it is limited to the confines of the State of Illinois, does not purport to regulate interstate commerce, and that its effect must be determined from what it purports to do and not from what actually results. Such a conclusion is contrary to the rules of law laid down in *South Covington Ry. Co.* v. *Covington*, 235 U. S. 537, l.c. 545; *Southern Pac. R. R. Co.* v. *R. R. Commission*, 10 F. Supp. 918; *A. T. & S. F. Ry. Co.* v. *LaPrade*, 2 F. Supp. 855; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50,

and *Shafer* v. *Farmers' Grain Co.*, 268 U. S. 189. It is also contrary to the decision in *People* v. *Cross*, 361 Ill. 405.

As we understand the law, if Congress has taken charge of the field, a State cannot legislate in that field, even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved. The question is whether Congress has taken possession of the field, and it is immaterial then whether it has legislated concerning a particular matter within the field. In support of this statement we cite: *Penn. R. R. Co.* v. *Public Service Com.*, 250 U. S. 566; *Southern Ry. Co.* v. *R. R. Com. of Ind.*, 236 U. S. 439; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605. To the same effect are: *Staten Island Rapid Transit Co.* v. *P. S. C.*, 16 F. (2d) 313; *Southern R. Co.* v. *U. S.*, 222 U. S. 20, 56 L. Ed. 72; *Texas & Pacific R. Co.* v. *Rigby*, 241 U. S. 33, 60 L. Ed. 874; *Northern Pacific R. Co.* v. *Washington*, 222 U. S. 370, 56 L. Ed. 237; *Erie R. Co.* v. *New York*, 233 U. S. 671, 58 L. Ed. 1149; *Oregon-Washington R. & N. Co.* v. *Washington*, 270 U. S. 87, 70 L. Ed. 482; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341, 71 L. Ed. 672; *C. & W. C. R. Co.* v. *Varnville F. Co.*, 237 U. S. 597, 59 L. Ed. 1137; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 57 L. Ed. 314; *Prigg* v. *Pennsylvania*, 10 L. Ed. 1060; *Houston* v. *Moore*, 50 L. Ed. 19, as well as the cases heretofore cited.

In *Penn. R. R. Co.* v. *Public Service Com.*, 250 U. S. 566, the Supreme Court of the United States held that Congress had taken charge of all matters connected with the construction of cabooses and mail cars, and that the States were powerless to legislate. The logical result of this decision is that Congress has taken full jurisdiction of the matter of cabooses, including their construction, equipment, where they shall be placed in the trains, and whether they shall be placed at all on trains. The dissenting opinion of Mr. Justice Clark, l.c. 570, acknowledges this construction of the majority opinion.

The Supreme Court of Illinois in previous decisions had likewise sustained our position upon this point. *Staley* v. *I. C. R. R. Co.*, 268 Ill. 356; *People* v. *I. C. R. R. Co.*, 324 Ill. 591; *St. Louis C. R. Co. v. Blumberg*, 325 Ill. 387, and *Gamble-Robinson Co.* v. *U. P. R. Co.*, 262 Ill. 400.

The undisputed evidence shows that the furnishing of cabooses was a working condition that had always been determined by contract between appellant and its employes. Under the amended Railway Labor Act of June 21, 1934, U. S. C. A. Vol. 45 Supp., beginning on page 235, it appears that Congress, by the passage of that act, conferred upon the National Railroad Adjustment Board full jurisdiction for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions. Congress has also taken jurisdiction of the field by the passage of the Car Service provision (paragraphs 10 to 17, incl., and paragraph 21 of Sec. 1 of the Interstate Commerce Act) 49 U. S. C. A., par. 1 (10-17, 21); by the Boiler Inspection Act, 45 U. S. C. A., sec. 22, et seq.; the Power Brake provision of the Safety Appliance Act, 45 U. S. C. A., sec. 1, et seq.; by Sec. 26 of the Interstate Commerce Act, 49 U. S. C. A. 26, and by Sec. 439 of the Transportation Act of 1920, as construed by the Supreme Court of the United States in *Dayton-Goose Creek Ry. Co.* v. *U. S.*, 263 U. S. 456, 478. Sec. 439 of the Transportation Act was inserted in the Interstate Commerce Act as Sec. 20a (49 U. S. C. A., Sec. 20a), and subjects to the approval of the Interstate Commerce Commission all issues of securities or other evidences of indebtedness. The effect of this enactment was discussed by this Court in *R. R. Com.* v. *Southern Pacific Ry. Co.*, 264 U. S. 331.

Furthermore, we conceive it to be the law, and the Supreme Court of Illinois so recognizes the fact, that if a State enactment imposes a direct burden on interstate commerce it must fall, regardless of Federal legis-

lation. The point of such an objection is not that Congress has acted but that the State has directly restrained that which in the absence of Federal regulation should be free. In other words, if Congress has taken possession of the field, the State cannot regulate at all concerning interstate traffic, but even if Congress has not taken possession of the field, a State cannot legislate if its enactment imposes a direct burden on interstate commerce.

Minnesota Rate Cases, 230 U. S. 352-396;
Lemke v. *Farmers' Grain Co.*, 258 U. S. 50;
Shafer v. *Farmers' Grain Co.*, 268 U. S. 189;
Buck v. *Kuykendall*, 267 U. S. 307;
C. B. & Q. R. Co. v. *R. R. Com.*, 237 U. S. 220;
K. C. Ry. Co. v. *Kaw Valley Drainage Dist.*, 233 U. S. 75;
U. S. v. *Southern Ry. Co.*, 222 U. S. 20;
Southern Ry. Co. v. *R. R. Com. of Ind.*, 236 U. S. 439;
South Covington & Cincinnati Ry. Co. v. *Covington*, 235 U. S. 537.

Under these decisions, and particularly the case of *South Covington & Cincinnati Street Ry. Co.* v. *Covington*, 235 U. S. 537, we submit that the effect of the order of the Illinois Commerce Commission as to the bridge runs constitutes a direct burden on interstate commerce. The latter case held invalid certain provisions of an ordinance of Covington, Kentucky, which, through its very nature, in order to be complied with in Covington, Kentucky, necessarily had to be complied with in Cincinnati. The same situation exists in the instant case.

Attention is also called to the case of *A. T. & S. F. Ry. Co.* v. *LaPrade*, 2 Fed. Supp. 855, a three-judge court decision involving the train limit law of Arizona, and also to the case of *Southern Pacific R. R. Co.* v. *R. R. Com. of California, et al.* (Brotherhood of Railroad Trainmen,

et al., intervenors), reported at 10 F. Supp. 918, a decision of another three-judge court. This was an order requiring cabooses under certain conditions, where compliance with it required cabooses in a State other than the one entering the order or the building of a switch-track costing $6700.00. The three-judge court held that such an order was invalid and repugnant to the interstate commerce section of the Constitution of the United States.

As to the runs covered by Finding 34, viz: the interyard runs, containing 98% interstate commerce, the same situation exists as to the bridge runs, except that on these runs the practical effect of the order would not be to compel cabooses to be attached to trains for several miles in Missouri. All of the other features covered by the above decisions apply to these runs covered by Finding 34, as well as the bridge runs covered by Finding 35.

It is further submitted, and the Supreme Court of Illinois held otherwise, that the benefits accruing by putting this order in effect are so disproportionate to the expense involved, and the cost so exorbitant compared to the benefits, that it constitutes a deprivation of appellant's property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. In support of our position in this respect, we cite: *Colorado* v. *U. S.*, 271 U. S. 153; *Panhandle Eastern Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613; *Penn. Coal Co.* v. *Mahon*, 260 U. S. 393, to the effect that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"; *Great Northern R. R. Co.* v. *Minnesota*, 238 U. S. 340, to the effect that any act requiring the expenditure of money upon the part of a railroad company involves the taking of its property, and the question whether this is done with or without due process of law depends upon the

special circumstances. We further cite *State of Washington ex rel. Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, and *C. B. & Q. R. R. Co.* v. *Commerce Com.*, 364 Ill. 213.

The following cases, among many, also support the above rules:

Southern Railway Co. v. *Virginia*, 290 U. S. 190, 78 L. Ed. 260;

Georgia Power Co. v. *Decatur*, 281 U. S. 505, 74 L. Ed. 999;

Norfolk & W. Railroad Co. v. *P. S. C.*, 265 U. S. 70, 68 L. Ed. 904;

Chesapeake & Ohio Ry. Co. v. *P. S. C.*, 242 U. S. 603, 61 L. Ed. 520;

Miss. R. R. Com. v. *M. & O. R. Co.*, 244 U. S. 388, 61 L. Ed. 1216;

C. M. & St. P. R. R. v. *Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423;

C. B. & Q. Ry. v. *Wisconsin R. R. Com.*, 237 U. S. 220, 59 L. Ed. 926;

Mo. Pac. Ry. Co. v. *Kansas*, 216 U. S. 262, 54 L. Ed. 472;

Atlantic Coast Line v. *N. Car. Corp. Com.*, 206 U. S. 1, 51 L. Ed. 933;

Chicago & N. W. Ry. v. *Ochs*, 249 U. S. 416, 63 L. Ed. 679;

Wisconsin M. & P. R. Co. v. *Jacobson*, 179 U. S. 287, 45 L. Ed. 194;

C. B. & Q. Ry. Co. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979.

The Federal questions passed upon by the Illinois Supreme Court are not only substantial but are also important. The effect upon appellant is great not only in added expense but also in delay to interstate shipments. Furthermore, this Court wil take judicial notice of the large number

of railroads in this country engaged in transporting interstate freight. If a precedent is set in this case that sustains such a direct burden on interstate commerce, it is undoubtedly true that other States will follow with like regulations and consequent burdens. In such a case, the general effect all over the nation would be great. The importance of finally and decisively settling these questions by a decision of this Court is apparent, and the impelling necessity of such a decision is obvious.

We, therefore, submit, on the question of jurisdiction of the Supreme Court of the United States of this cause on appeal, that this case involves the validity of a statute of the State of Illinois as repugnant to the Constitution of the United States; that the Supreme Court of Illinois passed upon these questions and sustained the validity of the statute as against the constitutional grounds urged against it; that the Federal questions raised are substantial and ought to be decided by the Supreme Court of the United States, and that, therefore, substantial Federal constitutional questions being presented, coming within the purview of Sec. 237 of the Judicial Code, the Supreme Court of the United States has full jurisdiction of this case on appeal.

All of which is respectfully submitted.

BRUCE A. CAMPBELL,
RUDOLPH J. KRAMER,
CARLETON S. HADLEY,
WALTER N. DAVIS,
LOUIS A. MCKEOWN,
Counsel for Appellant, Terminal Railroad Association of St. Louis.

APPENDIX "A".

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION.

26601.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

Complaint in the matter of failure to provide caboose cars for switchmen in the East St. Louis switching district.

Order.

BY THE COMMISSION:

On March 4, 1938, the Brotherhood of Railroad Trainmen of Illinois, complainant herein, filed a complaint with the Commission alleging the failure of the Terminal Railroad Association of St. Louis, respondent herein, to provide caboose cars for switchmen in the territory in, around and about East St. Louis, Illinois. The complaint filed herein further alleges that as a result of the failure to provide the said caboose cars, the switchmen, in the performance of their duties on transfer trains, are necessarily required to ride on the draw bar in between freight cars, or on the top of, or on the side of freight cars where numerous reduced vertical and horizontal clearances prevail.

The complaint further alleges that the life, health and safety of the aforesaid switchmen of transfer cars and of other employees of said respondent and of the public are endangered by the aforesaid failure to provide the said caboose cars within the State of Illinois.

On April 6, 1938, respondent herein filed its answer to the above described complaint in which it is expressly denied that the Commission has any power, right or jurisdiction to enter any order in regard to the subject matter of this complaint so far as any movements in interstate

commerce are concerned. Respondent further, in its answer, says that it now provides all of the facilities mentioned in the complaint that are reasonably necessary for the health, safety and life of its employees.

The answer further states that so far as interstate movements of trains or cuts of cars are concerned, this Commission has no power, jurisdiction or authority to enter any order requiring cabooses for interstate runs between the State of Illinois and the State of Missouri, and respondent, in its answer, expressly raises said question of the jurisdiction of the Commission so far as any interstate runs or movements are concerned.

Pursuant to notice as required by law, and by the rules and regulations of the Commission, this matter came on for hearing at the offices of the Commission at Chicago, Illinois, on April 27, 1938. Further hearings were held from time to time at the Commission offices at Chicago and at Springfield, Illinois, and the case was marked "heard and taken" on December 7, 1939. Both parties in interest were duly represented by counsel at all hearings in this matter, and introduced evidence, both oral and documentary.

During the course of the proceedings the Commission directed its Chief Railroad Inspector, Mr. R. B. Thomas, to make an investigation of the subject matter of the complaint, to prepare a written report and submit the same to both parties, and to be available to testify and to be cross-examined by either or both parties The investigation was made, the report submitted in three sections, and Mr. Thomas testified on direct and cross-examination.

On June 29, 1939, respondent filed its brief on the question of jurisdiction. On July 15, 1939, complainant filed its brief in answer to the brief filed by respondent. On August 4, 1939, respondent filed a brief in reply to said brief filed by complainant.

The evidence shows that East St. Louis is a terminal point for several railroads operating in or through the State of Illinois. Practically every one of these railroads has at least one yard at East St. Louis or in the immediate vicinity thereof. Under the prevailing practice of the

industry, a large volume of business is carried on by the respective railroads among themselves, involving the movement of cars from the tracks or yards of one railroad to the tracks or yards of another, and this results in a large number of such interchanges daily. The territory within which these operations are performed constitutes a switching district.

The respondent herein is engaged in performing terminal services for these various railroads as well as for itself. The respondent itself operates in three principal yards in the East St. Louis switching district which are known as Central District or C. D. Yard, Madison Yard, and Wiggins No. 2 Yard, as well as in certain subsidiary yards. Interchanges are made to and from these yards either altogether or in part by respondent. In some instances the interchange in one direction may be handled by a railroad other than respondent. In addition to these operations the respondent directly serves certain industries in the East St. Louis switching district.

Each of respondent's aforementioned yards consists of a number of tracks over which the classification or sorting of railroad cars is accomplished. Interchanges received in these yards are classified with reference to the immediate disposition of the particular car, which may be its delivery to a certain industry by respondent or its delivery to a railroad other than the one from which the interchange originated.

The evidence further shows that interchange operations are carried on between St. Louis, Missouri, and the aforesaid three yards of respondent in Illinois via the Eads Bridge or the Merchants' Bridge. Both bridges span the Mississippi River joining the East St. Louis switching district with St. Louis, Missouri, and the bridges are approximately three miles apart. The boundary line dividing the State of Illinois from the State of Missouri intersects the Eads Bridge at a point about eleven hundred (1100) feet west of the west curb of Front Street in the City of East St. Louis, and it intersects the Merchants' Bridge at a point about seven hundred seventy-five (775) feet west of the Illinois shore line when the river is at a stage of —2.4 feet.

The evidence further shows that on the Eads Bridge in Illinois there are clearances restricted to such an extent that it is unsafe for a switchmen to ride the tops or sides of railroad cars on that portion of the bridge. It also appears from the record that the prevailing lateral clearances on a portion of the Merchants' Bridge in Illinois are such that it is unsafe for a switchman to ride the sides of cars thereon. The vertical clearances on that portion do not permit a switchman to stand erect on the tops of box cars. Some of the interchange movements over Merchants' Bridge by respondent and all of the interchange movements over the Eads Bridge by respondent are presently performed without caboose cars. The evidence further shows that under such circumstances the rear switchman on such interchange movements is compelled to ride on the rear draw bar of the rear car on that portion of the Eads Bridge in Illinois where the aforesaid restricted clearances prevail. On the Merchants' Bridge, however, the rear switchman may ride either the rear draw bar of the rear car or on the top of the rear car in a sitting position over that portion of the bridge in Illinois where the restricted clearances prevail.

The evidence further shows that at present, in making transfer, delivery or industry runs in Illinois without cabooses to or from its three yards in Illinois, respondent's rear switchmen are obliged to ride either the rear draw bar of the rear car or the top or side of that car; that in so riding the top, side or rear draw bar, the life, health, safety and comfort of said switchmen is endangered by the presence of snow, ice or rain, the inclemency of the weather, the sudden jerk or stop of the train, and the restricted clearances on the bridges. The evidence further shows that such danger would be obviated by the use of caboose cars on these runs.

The evidence is voluminous and varies widely upon the question of time delays, additional cost, and an adequate number of cabooses which would be occasioned by the requirement of caboose cars. From the evidence it appears that there are thirty-nine (39) transfer, delivery and industrial runs made by respondent in Illinois, exclusive of those runs made by way of Eads Bridge or Merchants'

Bridge, and exclusive of those runs presently provided with cabooses full time throughout the year. Four (4) of these thirty-nine (39) runs presently operate with cabooses between October 15 and May 1 of each year. These thirty-nine (39) runs vary in length from less than one-half mile to more than ten miles each way within the East St. Louis switching district.

The evidence shows that of these thirty-nine (39) runs there are twenty (20) in which the one-way distance traveled is in excess of two miles. It further appears that the said twenty (20) runs include the four (4) runs above mentioned that presently carry cabooses from October 15 to May 1. Also, it appears that there is a greater degree of need for caboose cars on the aforesaid twenty (20) runs and the runs via Eads Bridge or Merchants' Bridge than on the remainder of the said thirty-nine (39) runs made by respondent in the East St. Louis switching district. The degree of need is measured by a consideration of a multitude of facts, such as the amount of time that would be spent in a caboose if one were provided, the distance that is traveled in making a particular run, the character of the work performed by the crew members, the working conditions, the inclemency of the weather, prevalence of restricted clearances, etc., all of which affect the health, safety, comfort and convenience of the employees.

The evidence further shows that most of the other railroads operating in the East St. Louis switching district under conditions similar to those under which respondent operates, now use caboose cars.

The Commission having given due consideration to the petition, the answer, briefs and all the evidence, both oral and documentary introduced at the hearings in this matter, and being fully advised in the premises, is of the opinion and finds:

(1) that it has jurisdiction of the subject matter of this case and the parties hereto;

(2) that the Terminal Railroad Association of St. Louis, respondent herein, is a corporation engaged in the transportation of passengers and goods as a common carrier in the State of Illinois, and is a public utility as defined in

Section 10 of "An Act concerning public utilities as amended;

(3) that in and around the City of East St. Louis, Illinois, there exists an area in which a number of railroads perform many of their operations, and which is known as the East St. Louis switching district;

(4) that certain of the railroads, to wit: The Alton Railroad Company, The Baltimore and Ohio Railroad Company, the Chicago, Burlington & Quincy Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Illinois Central Railroad Company, the Litchfield and Madison Railway Company, the Louisville and Nashville Railroad Company, the Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, the Southern Railway Company, the Wabash Railway Company, the Alton and Southern Railroad, the St. Louis Southwestern Railway Company, The St. Louis and O'Fallon Railway Company, the St. Louis and Belleville Electric Railway Company and the Missouri Pacific Railroad Company, operating in or through the State of Illinois, maintain and operate at least one railroad yard in the East St. Louis switching district; that cars in the freight trains arriving in these yards are switched or classified and assembled therein by their own switching crews with reference to the respective routing of the said cars; that deliveries are made of the groups of cars so assembled and requiring transfer to the yards of other railroads;

(5) that the respondent railroad company maintains and operates three principal yards, namely, C. D., Madison and Wiggins No. 2, each consisting of a number of tracks ranging from ten (10) or less to seventy (70) or more cars in length, as well as certain subsidiary yards, within the confines of the said East St. Louis switching district, and in each of these principal yards, usually six to eight switching crews working in shifts of approximately eight hours each, are engaged continuously in switching, making transfers, and also render direct service to certain industries in the said district when necessary;

(6) that during the process of making certain of the aforesaid transfers, the cars are moved to one or more of the aforesaid respondent's yards, where further classification may or may not occur before final delivery to the receiving railroad has been completed; that delivery, transfer and industry runs consist of groups or cuts of cars varying from one or two to fifty or more cars in number;

(7) that respondent's switching crews assigned to C. D. Yard make transfers between C. D. Yard and the yards of the following railroads: The Alton Railroad Company, The Baltimore and Ohio Railroad Company, the Chicago, Burlington & Quincy Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Illinois Central Railroad Company, the Litchfield and Madison Railway Company; the Louisville and Nashville Railroad Company, the Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, the Southern Railway Company and the Wabash Railway Company;

(8) that respondent's switching crews assigned to Madison Yard make transfers between Madison Yard and the yards of the following railroads: The Pennsylvania Railroad Company, The New York, Chicago and St. Louis Railroad Company; the Litchfield and Madison Railway Company, the Alton and Southern Railroad, The St. Louis Southwestern Railway Company, the Illinois Central Railroad Company, the St. Louis and O'Fallon Railway Company, the St. Louis and Belleville Electric Railway Company, the Valley Terminal Railway, and the Illinois Terminal Railroad Company; that in addition, there are industrial runs made out of the Madison Yard, which are known as Granite City East side, Granite City West side and the Granite City combination; and also, deliveries are made by the Madison Yard crews to and from the National Stock Yards;

(9) that respondent's switching crews assigned to the Wiggins No. 2 Yard make transfers between Wiggins No. 2 Yard and the yards of the following railroads: the Missouri Pacific Railroad Company at Dupo, the Illinois Central Railroad Company, the St. Louis Southwestern Railway

Company, the Wabash Railway Company, The Baltimore and Ohio Railroad Company-The Alton Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Mobile and Ohio Railroad Company; the Litchfield and Madison Railway Company, the Chicago, Burlington & Quincy Railroad Company and The New York, Chicago and St. Louis Railroad Company; that in addition the aforesaid crews render industrial switching service to the Monsanto Chemical Company, the Phillips Petroleum Company, the Union Electric Company of Illinois (the Cahokia power plant); and also deliveries are made between Wiggins No. 2 Yard and the Madison Yard by the Wiggins No. 2 Yard crews;

(10) that there are two bridges that span the Mississippi River joining the East St. Louis switching district with St. Louis, Missouri, which are known as the Eads Bridge and the Merchants' Bridge;

(11) that some of respondent's crews are engaged in making transfers of trains to and from respondent's three yards in the East St. Louis switching district and St. Louis, Missouri, by way of the aforesaid bridges;

(12) that all such transfer movements to and from C. D. Yard over the Eads Bridge by respondent are made without caboose cars;

(13) that of such transfer movements over the Merchants' Bridge by respondent, bound to or from either the Madison Yard or the Wiggins No. 2 Yard, only one is provided with a caboose car, and that one so provided for only twenty-eight (28) weeks of the year;

(14) that the boundary line between the State of Illinois and the State of Missouri intersects the Eads Bridge at a point about eleven hundred (1100) feet west of the west curb of Front Street in the City of East St. Louis, and it intersects the Merchants' Bridge at a point about seven hundred seventy-five (775) feet west of the Illinois shore line when the river is at a stage of —2.4 feet;

(15) that the governing vertical clearance on both tracks of the Eads Bridge is sixteen feet two inches between top

of rails and overhead obstructions; that the governing lateral clearances on the north track of said bridge are six feet five and three-quarters inches to the north of the center line of said track, and seven feet one-quarter inch to the south of said center line; that the governing lateral clearances on the south tracks are substantially similar to those on the north track;

(16) that the governing vertical clearance on both tracks of the Merchants' Bridge is nineteen feet nine and one-half inches; that the governing lateral clearances on the north track of said bridge is six feet nine inches to the north of the center line of said track, and six feet eight inches to the south of the center line of the south track; that the distance between center lines of said tracks on said bridge is twelve feet one inch; that there are no fixed obstructions between the center lines of the said tracks on said bridge;

(17) that railroad cars varying between twelve feet ten inches and fifteen feet in height, and between ten feet and ten inches in width are moved by respondent over the Eads Bridge; that railroad cars varying between fourteen feet six inches and four een feet eleven inches in height, and between ten feet five inches and ten feet ten inches in width are moved by respondent over the Merchants' Bridge;

(18) that the side sway or rock of cars in motion further reduces the existing lateral clearances on the aforesaid bridges;

(19) that the governing clearances on the Eads and Merchants' Bridges are restricted to such an extent that the riding on the tops or sides of cars over said bridges is extra-hazardous;

(20) that one member of each of respondent's crews is required to ride the rear car of all delivery, transfer and industrial runs;

(21) that by reason of this requirement the rear switchman is obliged to ride either on the rear draw bar of the rear car, or the top or side of that car; that respondent's rule forbids switchman to ride inside loaded open top cars;

(22) that sudden jerks and sudden stops of the train commonly occur during the course of delivery, transfer or industrial runs; that rear switchmen have been injured by being dislodged and thrown from cars by such sudden jerks and stops;

(23) that during certain seasons of the year, the tops, sides, ends, draw bars, grab irons, and other appurtenances of cars are frequently covered with ice, sleet, snow or rain;

(24) that the presence of ice, sleet, snow or rain on cars as aforesaid contributes to and causes insecurity of footing and uncertainty in grasping and holding on to cars during the making of delivery, transfer or industrial runs;

(25) that without caboose cars, rear switchmen of respondent's crews are openly exposed to inclement weather in riding the tops, sides, end or draw bars of cars as aforesaid, and also that, at present, no facility is provided for the storage of safety devices, flagging equipment, lunches, drinking water, extra cothing, or for performing clerical work enroute on delivery, transfer, or industrial runs not now provided with caboose cars;

(26) that the train line air valve at each end of a car is located adjacent to the draw bar; that in cases of emergency the rear switchman stops the train by opening said valve;

(27) that, because of such location, a rear switchman riding the top or side of a rear car cannot readily or safely open said valve;

(28) that by reason of the matters and things set forth in findings 18 through 25, inclusive, the physical and mental condition of respondent's rear switchmen is materially adversely affected;

(29) that by reason of all the matters and things hereinabove set forth, the health, safety, comfort and convenience of respondent's rear switchmen is materially affected;

(30) that the furnishing, maintenance, and operation of caboose cars by respondent on its transfer, delivery and industrial runs will provide facilities that will shelter respondent's rear switchmen from inclement weather, afford convenient places for the storing of extra clothing, food, drinking water, first aid kits, flagging equipment and vari-

ous other devices, eliminate the necessity of the respondent's rear switchmen's riding the tops, sides, ends or draw bars of the rear cars, eliminate the hazards of restricted clearances as they affect respondent's rear switchmen, afford ready and safe accessibility to a train air line valve or the like;

(31) that the furnishing, maintenance and operation of caboose cars by respondent as aforesaid will promote and safeguard the security, safety, health, comfort, and convenience of respondent's rear switchmen during transfer, delivery and industrial run service;

(32) that in view of the distance traveled in making particular runs, the time required to make such runs, the character of the work performed by the crew members, the conditions and circumstances under which the work is performed, the inclemency of the weather, the prevalence of restricted clearances, the necessity of storage facilities and safety devices, and all the many facts that affect the health, safety, comfort, and convenience of the employees, the degree of need in the cases of twenty of the thirty-nine or more delivery, transfer or industrial runs made by respondent wholly within the State of Illinois, is such as to reasonably require that a caboose car be provided for each such run throughout the year;

(33) that for the same reasons as set forth in the preceding finding, the degree of need in the cases of the runs covered by findings 11, 12 and 13, is such as to reasonably require that a caboose car be provided for each such run throughout the year;

(34) that it is reasonable to require the respondent to furnish, maintain and operate caboose cars throughout the year on its transfer, delivery and industrial runs hereinafter grouped by yards. Each such run is identified by its common name:

(1) Central District Yard—

(a) Pennsylvania
(b) Mobile and Ohio
(c) Southern
(d) Illinois Central

(2) Madison Yard—

(a) C D Yard
(b) Granite City east side
(c) Granite City west side
(d) Granite City combination
(e) Alton and Southern-St. Louis and Southwestern
(f) Illinois Central
(g) St. Louis and O'Fallon Railway-St. Louis and Belleville Electric;
(h) Valley Junction;
(i) Pennsylvania

(3) Wiggins No. 2 Yard—

(a) Madison Yard
(b) Dupo
(c) Illinois Central
(d) St. Louis and Southwestern
(e) Monsanto Chemical
(f) Phillips Petroleum
(g) Cahokia

(35) that it is reasonable to require the respondent to furnish, maintain and operate caboose cars throughout the year on its transfer or delivery runs hereinafter described, in so far as these runs are operated within the confines of the State of Illinois:

(1) All runs into or out of C D Yard via Eads Bridge;

(2) Runs via Merchants' Bridge moving into or out of
(a) Madison Yard;
(b) Wiggins No. 2 Yard;

(36) that the cost of furnishing, maintaining and operating said caboose cars will not impose an undue, unreasonable or unfair burden upon the respondent, considering the fact that said cabooses are essential to promote the security, safety, health, comfort and convenience of respondent's rear switchmen;

(37) that the prayer of the complaint filed herein should be granted to the extent set forth in findings 34 and 35 of this order;

(38) that the remainder of the prayer of said complaint should be denied;

(39 that the motion of respondent to dismiss this proceeding for want of jurisdiction should be denied;

(40) that the motion of respondent to strike from the record all evidence introduced by Chief Railroad Inspector of the Commission should be denied; and,

(41) that the Commission should retain jurisdiction of the subject matter of this proceeding and the parties hereto for the purpose of entering such further order or orders as it may deem meet.

It Is Therefore Ordered that the Terminal Railroad Association of St. Louis, respondent herein, be, and it is hereby, required and directed to furnish, maintain, and operate caboose cars on its transfer, delivery and industrial runs, more specifically set forth in finding 34 of this order within sixty (60) days of the date of service of this order.

It Is Further Ordered that respondent herein be, and it is hereby, required and directed to furnish, maintain, and operate caboose cars on its transfer and delivery runs more specifically set forth in finding 35 of this order within thirty (30) days of the date of service of this order.

It Is Further Ordered that the motion of respondent to dismiss this proceeding for want of jurisdiction be, and the same is hereby, denied.

It Is Further Ordered that the motion of respondent to strike from the record all the evidence introduced by the Chief Railroad Inspector of the Commission be, and the same is hereby, denied.

It Is Further Ordered that the respondent shall make report in writing within five days after the caboose cars have been provided on the runs as required by the terms and conditions of this order, and shall mail such report or reports to the Secretary of the Commission.

IT IS FURTHER ORDERED that the Commission hereby retains jurisdiction of the subject matter of this proceeding and over the parties hereto for the purpose of entering such further order or orders as it may deem meet.

By order of the Commission at Chicago, Illinois, this 1st day of February, 1940.

(SEAL) (Signed) JOSEPH E. KNIGHT,
Secretary.

APPENDIX "B".

26601.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

Complaint in the matter of failure to provide caboose cars for switchmen in the East St. Louis switching district.

Dissenting Opinion of Commissioner Olson.

BY COMMISSIONER OLSON:

The order adopted requires cabooses to be attached to train movements, not only in the State of Illinois, but also to such train movements as use the Eads and Merchants Bridges between the States of Illinois and Missouri. I do not concur with that part of the order which requires cabooses to be attached to trains moving between the States of Illinois and Missouri. While the order is limited to the movement within the State of Illinois, it is careful to mention the number of feet on each bridge from the Illinois side which it considers to be within the territory of the State of Illinois. It is impracticable for a caboose to be attached to a train of cars and proceed only to what the order considers the Illinois limit, because such caboose, by the very nature of the operation, must continue on to the State of Missouri, and therein occupy part of the railroad yards in that state. It is equally true that cabooses must be attached

in the State of Missouri to trains originating there, destined for Illinois and routed over the said bridges. This order not only interferes with interstate commerce, but directs what must be done in another state wherein the transportation movement destined for this state, begins. Another observation clearly shows the interstate character of this operation for while the caboose might be in one state, the locomotive drawing the same may very well be in the other.

The courts frequently have considered the power of a state to regulate railroad movements. In *Chicago, Rock Island & Pacific Railway Company* vs. *Arkansas*, 219 U. S., the right of the State of Arkansas to enact a Full Crew Law was challenged. As the law operated solely within the boundaries of the state, its constitutionality was upheld. On the other hand, in *A. T. & S. F. Ry.* vs. *La Prade*, 2 Fed. Sup. 285, an act of the State of Arizona limiting the number of cars in one train movement was held unconstitutional, because it placed an undue burden upon interstate commerce, in that such limitation directly interfered with such commerce. The court pointed out the effect of such limitation law upon an east-bound train, leaving a point in California, consisting of eighty to one hundred cars or more, being hauled to a division point west of the boundary of Arizona, and there broken up into shorter trains of seventy cars or less in order to comply with the Arizona Law, and again upon leaving the State of Arizona being re-formed into a train of eighty cars or more. In order to form such train of eighty cars or more at least two separate movements of an interstate train would be necessary in the State of Arizona.

The City of Covington, Kentucky, passed an ordinance limiting the number of passengers using street cars in said city. The validity of this ordinance came before the Supreme Court of the United States in *South Covington Railway Company* vs. *Covington*, 235 U. S. 537. The Company operated street cars from the city of Covington in the state of Kentucky into the city of Cincinnati in the state of Ohio. In so far as this ordinance attempted to regulate the movement of cars in interstate commerce, it was held inoperative. In so holding, the court in part used the following language: "We think the necessary effect of these regula-

tions is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railways in many instances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and the interstate business might be impeded by conflicting and varied regulations in this respect with which it might be impossible to comply. On one side of the river, one set of regulations might be enforced, and on the other side quite a different set, and both being practically a continuous movement."

If Illinois has the power to adopt rules and regulations affecting train movements from this state to Missouri, Missouri surely has like power to do the same, which may result as stated in the case last cited, that on the one side of the river there may be one set of regulations, and another set on the other side. In my opinion the order adopted, in so far as it relates to movements over the bridges mentioned, invades the field of federal regulation, and is an unconstitutional interference with interstate commerce. While the agencies of the state and nation should be alert in the exercise of their respective jurisdictions, neither should attempt to invade the exclusive field of the other. The legislature of our state recognized the foregoing principle, for Section 90 of the Public Utilities Act states the following: "Neither this Act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this Union, except when specifically so stated, and insofar as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress, and the decisions of the Supreme Court of the United States."

It may be urged that the foregoing legislative declaration merely states the law, still it must be considered as a direction to the agency created by the Act, to obey its terms.

I am in full accord with the aims and purposes of the order, but withhold concurrence with that part thereof which concerns movements over the bridges in question be-

cause I believe the same to be an attempted regulation of interstate commerce and beyond our jurisdiction so to do. The end sought is worthy and admirable and almost persuades the exercise of such authority, yet a proper regard for the respective jurisdictions of the state and nation requires the exercise of restraint. I concur in all of the other provisions set forth in the findings and order.

(Signed) ANDREW OLSON,
Commissioner.

APPENDIX "C".

OPINION OF THE SUPREME COURT OF THE STATE OF ILLINOIS.

Docket No. 26261—Agenda 8—November, 1941.

BROTHERHOOD OF RAILROAD TRAINMEN, et al., *Appellants,*

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *Appellee.*

Mr. Justice Stone delivered the opinion of the court:

Appellants seek reversal of a judgment of the circuit court of St. Clair county setting aside an order of the Illinois Commerce Commission requiring appellee to furnish, throughout the year, and maintain, caboose cars or shelter cars to be attached to cuts of freight cars transported to and from its yards in Illinois. The cause arises by petition of appellant Brotherhood of Railroad Trainmen, an organization representing trainmen and switchmen employed by appellee, filed with the Illinois Commerce Commission requesting that an order be entered requiring appellee to furnish caboose or shelter cars for its switchmen while in the performance of their duties in the territory in and around East St. Louis, Illinois. The petition alleged that appellee has failed to provide such cars for switchmen in the abovementioned territory, and as a result thereof switchmen, in the performance of their duties on transfer trains are necessarily required either to ride on

the draw-bar, in between freight cars, or on the top, or on the side of freight cars where numerous reduced vertical and horizontal clearances prevail, thus endangering the life, health and safety of such switchmen and of other employees, and of the public within the State of Illinois. Appellee's answer denied the power, right or jurisdiction of the Illinois Commerce Commission to enter any order in regard to the subject matter of the complaint so far as any movements in interstate commerce are concerned, and alleged that it now provides all the facilities reasonably necessary for the health, safety and lives of said employees.

Appellee is a railroad corporation which performs terminal services in the railroad switching district of East St. Louis, Illinois, and St. Louis, Missouri. Switchmen in its employ are assigned to particular switching crews. These crews make and break up trains in the yards, make deliveries from connecting roads to appellee; make transfer runs from the various yards of appellee to and from industries; make up trains and couple cars together, see that the air-brakes are coupled and in order on the train and when the train leaves the yard for a destination the switchmen take their proper positions on the train, the rear man taking his position on the rear car of the train, where he is required to ride. His duties are to line all switches back into proper position after their use by the train, and in case of a reverse movement, to watch street and highway crossings to protect the public. On some of the transfer runs, side or overhead clearance is insufficient to permit riding on the side or top of the rear car, in which case the rear switchman is required to ride the rear coupler of the car. The length of the trains handled by a crew on a trip varies from one to a hundred cars. A caboose is a railroad car furnished for the housing of train crews and equipped for their safety; provides a place for the crew to carry necessary flagging equipment, raincoats, extra or excess clothing, necessary first aid equipment and lunches; also to do any necessary clerical work. During the winter months, the handholds, draw-bars and sill steps of cars are often covered with ice, making it difficult for switchmen to get to the top of a car or to prevent being

jerked or jarred off. No caboose or shelter cars are furnished to crews working out of certain of the involved yards, though they are furnished from October to May each year on other runs by appellee, and on still other runs are furnished the year round. Various of the runs are entirely within the confines of the State of Illinois, others originate in Illinois and terminate in the yards of appellee in Missouri by crossing the Eads or Merchant's bridge, or originate in Missouri and after passing over one of those bridges terminate in one of the yards of appellee in Illinois. Ninety-eight per cent of the merchandise transferred in the runs between appellee's yards is being transported in interstate commerce. About sixty-eight passenger trains cross the Eads bridge each day. During the early part of each week about the same number of freight trains cross the bridge and later in the week the freight trains exceed the passenger trains in number. Approximately the same number of trains cross the Merchant's bridge each day.

The Eads and Merchant's bridges span the Mississippi river between East St. Louis in Illinois and St. Louis in Missouri. Each bridge has thereon double track railroads connecting with appellee's yards. The Commerce Commission found that the boundary line between the State of Illinois and the State of Missouri intersects the Eads bridge at a point about 1000 feet west of the west curb of Front street in the city of East St. Louis, and the Merchant's bridge at a point about 775 feet west of the Illinois shore line when the river is at a stage of 2.4 feet.

The commission's order, so far as the principal questions here are concerned, consisted of two items or findings and orders. By finding No. 34 it found that it is reasonable to require appellee to furnish, maintain and operate caboose cars throughout the year on its various transfer, delivery and industrial runs in and out of its three yards: (1) Central District Yard, (2) Madison Yard, and (3) Wiggins No. 2 Yard, the order specifying the particular runs among those yards or to line roads, all of which are within Illinois; and its finding No. 35 was the same as finding No. 34 as to reasonableness of the requirement, and ordered that in so far as operated within the State of Illinois: (1) in all runs into or out of C. D. Yard via Eads bridge, (2) runs

via Merchant's Bridge moving in or out of (a) Madison Yard, and (b) Wiggins No. 2 Yard, appellee furnish, maintain and operate caboose cars on its transfer, delivery and industrial runs.

On appeal the circuit court found that the portion of the order of the commission requiring cabooses to be attached to runs moving between appellee's yards in Illinois and over the Eads and the Merchant's bridges, is an interference with interstate commerce and beyond the power of the Illinois Commerce Commission. The court therefore set aside and reversed the order of the commission. It did not consider the validity of finding No. 34 and that part of the order since its power of review was merely to confirm or set aside the order as a whole. This was the correct procedure. *Brotherhood of Railroad Trainmen v. Elgin, Joliet and Eastern Railway Co.*, 374 Ill. 60.

The principal question in the case concerns the validity of the order of the commission requiring cabooses for these runs over the bridge. Though the commission's order applies only to cuts of cars moving within the State, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river.

Appellants argue that notwithstanding the trains involved in order 35 are moving in interstate commerce, the attaching of cabooses thereto is not a direct burden on interstate commerce but affects it but indirectly or incidentally, and that the order lies within the inherent power of the State to enact reasonable regulations for the protection of the health, lives and safety of persons within its confines. It is urged that only when Congress has acted is the power of the States impaired, and then only to the extent that their regulations shall not be such as to be in conflict with or repugnant to the action so taken by Congress. Appellee insists that the order based upon finding No. 35 as to the bridge runs is an undue burden upon, and a regulation of, interstate commerce, in violation of the commerce clause of the Federal constitution, and takes appellee's property without due process of law.

It is settled by decisions of the Supreme Court of the United States that a State can do nothing which will directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic. (*Atlantic Coast Line Railroad Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230; *Austin v. Tennessee*, 179 id. 343, 45 L. ed. 224; *Illinois Central Railroad Co. v. Illinois*, 163 id. 142, 41 L. ed. 107.) It is equally well settled that State or local enactments, passed in the exercise of the police power of the State, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce, are valid. *Minnesota rate cases, (Simpson v. Shepard,)* 230 U. S. 352, 57 L. ed. 1511, and the cases therein cited.

The question involved in this case is one of power of the Commerce Commission. The question whether a statute of the State or an order of the commission acting within the authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter. There are, however, certain principles under which rights of the States in the premises are to be recognized. All powers inhering in the people of the States, which have not been expressly granted to the United States or prohibited to the States, remain with the people. The State, by reason of its inherent and reserved police power, may enact laws promoting the peace and good order of society, for the preservation of life and health, or conducive to the comfort, convenience and welfare of the people. Notwithstanding acts coming within this reserve police power operate on the movements of interstate commerce and persons engaged therein, such law is nevertheless valid unless its effect is to directly lay some burden or restriction on interstate commerce which would not otherwise exist. (*Hennington v. State of Georgia*, 163 U. S. 299, 41 L. ed. 166; *Minneapolis and St. Louis Railroad Co. v. Emmons*, 149 id. 364, 37 L. ed. 769; *People ex rel. Stead v. Chicago, Indianapolis, and Louisville Railway Co.*, 223 Ill. 581.) Though by the Federal constitution Congress is given exclusive power to regulate commerce, the States may, in the exercise of the police power, make reasonable rules in regard to the method of carrying on interstate

business within the State, such as to provide precautions that shall be used to avoid danger to those engaged in interstate commerce within the State, or to the public, or may designate facilities for the comfort of passengers and employees, safety of freight carried, and the like. The test of the validity of such enactments or orders is whether they are consistent with the general requirement that interstate commerce shall be free and unobstructed. If they are, they do not amount to a regulation of such commerce. *Houston and Texas Central Railroad Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772.

The fact that a railroad may be engaged in both interstate and intrastate commerce, does not prevent a State from adopting such regulations as it may deem proper to provide for the safety of the men engaged in carrying on intrastate commerce, if such regulations are not inconsistent with or repugnant to acts of Congress adopted for the regulation of railroads engaged in interstate commerce. (*Luken v. Lake Shore and Michigan Southern Railway Co.*, 248 Ill. 377; *People v. Chicago, Indianapolis and Louisville Railway Co., supra; Missouri Pacific Railway Co. v. Kansas*, 216 U. S 262, 54 L. ed. 472.) It not only lies within the power of the State, but it is its duty, to establish such regulations as are reasonable and necessary for the safety of those engaged in the business conducted within the State. The rule is settled that so long as Congress does not occupy the field of regulation to be considered in a given case, each State is empowered to make regulations within that field regarding the safety of persons engaged in interstate commerce that passes through the State. Such regulations do not purport to regulate interstate commerce, but to care for the safety of persons within its borders. *Chicago, Rock Island and Pacific Railway Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290.

In the case before us the order of the Commerce Commission appealed from, affected two classes of freight movements. The first was dealt with in what is known as finding No. 34 of the order, and had to do with interyard movements of freight, wholly within the State, but which movements contained largely shipments destined for interstate commerce; and finding No. 35 of the order, having to do with

switching movements of cars across the Mississippi river into appellee's yards in Missouri. The order required the use of cabooses or shelter cars in so far as those movements take place within the State.

We do not doubt the power of the Commerce Commission, delegated to it by the General Assembly under the police power, to make reasonable regulations protecting the health, safety and welfare of those engaged in appellee's switching business, so long as such regulations do not constitute an attempt to regulate, or do not directly burden interstate commerce, or run counter to Federal regulations on the subject. Appellee says these orders are attempts to regulate interstate commerce and constitute a direct burden upon such commerce and so are void for want of jurisdiction in the commission to promulgate them. It is not claimed that the Congress has specifically legislated on the subject of its use of these cabooses though it is argued that Congress has preempted the field.

The evidence shows that without cabooses or shelter cars, switchmen are required to ride on the outside of the rear car of the cut of cars being moved, and that in many places in the yards and on the bridges, side or overhead clearances are insufficient to permit riding on the side or top of the cars, with the result that the switchman is required to ride upon the coupler, which is dangerous and becomes specially so during storm or winter periods. It is shown that the jarring or sudden stopping or starting of a cut of cars may cause the switchman to lose his hold and be thrown and to suffer injury. Protection against casualties of that sort is not only within the power but the duty of the State when the same is exercised in a manner not inconsistent with the Federal laws governing interstate commerce, where such have been enacted or where such regulations do not result in a direct burden on interstate commerce.

As we have seen, the circuit court did not pass upon the validity of finding No. 34 of the commission's order. However, both parties have briefed the question concerning the power of the commission to enter its order on that finding, and the reasonableness of that order, and as that question is involved in the validity of finding No. 35, pertaining to

transfers across the bridges, it becomes necessary to examine fundamental questions involved in both findings.

Whether either of these findings and orders of the commission are valid, depends in the main upon whether compliance with such orders lays a direct burden on interstate commerce. Where the effect of an intrastate transaction or regulation, as applied to interstate commerce, is merely indirect, the regulation producing such transaction remains within the domain of the State power. (*Schechter* v. *United States*, 295 U. S. 495, 79 L. ed. 1570.) As was said by the Supreme Court of the United States in *Carter* v. *Carter Coal Company*, 298 U. S. 238, 80 L. ed. 1160, quoting from the *Schechter case*, "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal government. • • • The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system." It was in the *Carter case* pointed out that the word "direct" "implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And, the extent of the effect bears no logical relation to its character."

Counsel argue as to both findings No. 34 and No. 35 of the Commission's order that they are a burden on interstate commerce in that they require an additional amount of time to attach and detach these cabooses and are unreasonable in that they involve a very large additional expense to appellee, and so constitute an unwarrantable interference with interstate commerce. The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, though appellant concedes that some time is required to add a caboose to these cuts of cars. It is argued that time required to comply with this order may, at times, involve

appellee in penalties for failure to comply with certain regulations governing the transportation of perishable goods and livestock. It does not appear, however, that such is a necessary result nor that such results cannot be avoided by arrangement of train schedules. We are of the opinion that the record in this case does not establish that time consumed in complying with this order is so great as to amount to a regulation of interstate commerce or a direct burden upon it. The order does not purport to do so but was obviously promulgated to protect the lives and health of citizens of this State engaged in appellee's business within the State.

As to finding No. 35, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that since there are no means of leaving a caboose at the State line, where it could be picked up on return, the only practical way in which compliance with the order of the commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within the State. This, appellee contends, is, in practical effect, a regulation of the movements of the appellee's trains in the State of Missouri, which is beyond the power of this State or its commission.

Numerous cases of the Supreme Court of the United States have been cited, none of which is entirely analogous on the facts to the case before us. In *Missouri Pacific Railway Co. v. Kansas, supra*, the Kansas Supreme Court ordered peremptory mandamus to compel the railroad to obey an order of the State Board of Railroad Commissioners requiring passenger train service to be established and maintained between Madison, Kansas and the Missouri State line on what is known as the Madison branch of the Missouri Pacific Railway. It was objected there that there were no terminal facilities at the State line between Kansas and Missouri and that to comply with the order the railroad would be required either to construct such facilities at that point or to carry its trains on through to and beyond Monteith Junction in the State of Missouri, where the Madison branch of the road intersects with the Missouri Pacific. The court pointed out, however, that the order of the

Railroad Commission was to supply the passenger service to the State line, and the fact that the practical method of compliance was to run the train across into Missouri, neither rendered the order unreasonable nor a direct burden on interstate commerce. It was also pointed out that its charter provisions required that the railroad conduct passenger traffic along this branch so far as it lay within the State of Kansas.

We are unable to see that charter contract features distinguish that case from the one before us on the question of State power. A claim of duty resting upon a utility to render service whether it arise out of its charter contract, an act of the General Assembly, or an order of an agency created by the General Assembly, based upon the police power of the State, involves the same ultimate question whether the State's order, sought to be invoked, is an attempt to regulate interstate commerce or places a direct burden upon that commerce. In this case and in the *Missouri Pacific case*, the same tests are to be applied in determining that question. In that case it was pointed out that the fact that the railroad extended its train operations into another State did not destroy the power of Kansas over its domestic commerce or bring local matters under the sway of Federal concern. That case, it will be noted, did not involve the character of order here under consideration, which draws its validity, if it has such, from the power of the State to protect its citizens from danger of injury.

Atchison, Topeka and Santa Fe Railway Co. v. *LaPrade*, 2 Fed. Supp. 855, involved the train limit law of Arizona, which provided that no trains of more than 70 cars should be transported in the State. The act was by a three-judge court held to be an invasion of the interstate commerce clause of the Federal constitution. It was there pointed out that as trains from eighty to one hundred cars were required to be broken into trains of not more than seventy cars at the boundary of Arizona, and additional engines and crews provided during the trip across the State, to be again coupled into long trains after leaving the State, the Arizona act infringed upon a field which was exclusively under Federal control, and the absence of Federal regulation concerning them did not give power to the State to

make rules which so necessarily controlled the conduct of interstate commerce; that the subject of the length of trains engaged in interstate traffic is national in character, requiring uniformity of regulation, which regulation is placed entirely under the control of Congress. Counsel for appellee argue that the case before us is analogous to the *LaPrade case*. This distinction, however, is to be noted: in the Arizona case the State requirements necessarily conflicted with Federal control of interstate commerce. Length of trains is a matter of national railroading, and the Arizona law was a direct attempt to control interstate commerce. There was no claim that it attempted to do anything else. It was not passed, as in the case before us, in the exercise of the State's police power and duty to protect the lives and safety of those engaged in operating the interstate trains.

It was pointed out in *Missouri Pacific Railroad Co.* v. *Norwood*, 283 U. S. 249, 75 L. ed. 1010, that in the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent the exercise of the police power of the States. In *South Covington and Cincinnati Street Railway Co.* v. *Covington*, 235 U. S. 537, 59 L. ed. 350, it is pointed out that in numerous instances that court had sustained local enactments based on the exercise of police power in the interest of public health and safety notwithstanding such regulations might incidentally or indirectly affect interstate commerce. This is also pointed out in the *Minnesota rate cases*, where the subject is reviewed at length. *Simpson* v. *Shepard*, 230 U. S. 352, 57 L. ed. 1511.

Counsel for appellee cite the *Covington case* as analogous on the facts to the case before us. In that case a petition was filed by the railway company in the Kentucky State court to enjoin the city of Covington from enforcing an ordinance for the regulation and operation of the street-cars of the company. This ordinance contained numerous provisions. Among others, it required that no street-car be allowed to carry more than one-third greater number of passengers, over and above the number for which seats were provided; that the company run and operate cars in sufficient number to at all times reasonably accommodate the public, and that it maintain a temperature in its cars of at least 50 degrees Fahrenheit. Many of the cars of the

company operated across the Ohio river over a bridge and into the city of Cincinnati, Ohio. Its traffic as to them was therefore interstate in character. The first two of the three provisions of the ordinance just referred to were held to be invalid on the ground that the necessary effect of such regulations was not only to determine the manner of carrying passengers in Covington and the number of cars to be used in so doing, but necessarily directed the number of cars to be run in Cincinnati and the manner of loading them there, where traffic was much more impeded and where the franchise privileges of the railway would not accommodate such increased number of cars. It was observed that if Covington could regulate these matters, Cincinnati could likewise, and interstate business might be impeded by the varying regulations. The provision of the ordinance regulating temperature to be maintained was held unreasonable and as practically impossible of performance. Other provisions of the ordinance were that the street-car company permit no one to ride on the rear platform unless the same is provided with suitable rail or barrier, and that no passengers be permitted to ride on the front platform unless a rail or barrier be provided separating them from the motorman, and that the company at all times keep its cars thoroughly clean and ventilated. These provisions were sustained as coming within the inherent police power of the State of Kentucky and it was held that it was competent for the State to provide for the safety and welfare of the people notwithstanding such regulations might indirectly affect interstate commerce.

Appellee's counsel argue that the *Covington case* is direct authority for their claim that this order of the Commerce Commission is invalid. They point out that if cabooses are required on these interstate switching runs, appellee will necessarily have to transport them for some distance in Missouri, and Missour could enact conflicting regulations. It will be noted that the factual situation in the *Covington case* was different, and was of much more difficulty. The franchise privileges of the street railway company in Cincinnati would not permit of compliance with the Covington ordinance and traffic conditions were much different. In

the case before us appellee owns the switch yards on both sides of the river, into which the switching movements are taken. The additional burden in operation would thus principally be to provide places for and to attach these cabooses.

Does the fact, if such be a fact, that the practical method of complying with the order would be to haul these cabooses into Missouri, of itself render the order of the commission invalid as a direct burden upon interstate commerce? In *New York, New Haven and Hartford Railroad Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, the court was considering a New York statute regulating the heating of steam-passenger cars, and directing that guards and guard posts be placed on railroad bridges and trestles of approaches thereto. It was contended that the statute was repugnant to the constitutional provision that Congress shall have power to regulate commerce among the several states, and also repugnant to the fourteenth amendment of the constitution requiring that no State shall deprive anyone of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. It was held that while laws of the State must yield to acts of Congress passed in execution of the powers conferred by the constitution, the mere grant to Congress of power to regulate commerce among the several states did not of itself and without legislation by Congress, impair the authority of states to establish such reasonable regulations as were appropriate for the protection of the health, lives and safety of its people. It was argued there, as here, that a conflict between State regulations in respect of heating passenger cars used in interstate commerce, would make safe and rapid transportation impossible, since the different States through which the trains were to travel might put into effect conflicting laws that would be a hardship upon travel. As to that objection the court replied: "These possible inconveniences cannot affect the question of power in each State to make such reasonable regulation for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide

for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the States covering the same ground." It was in that case, as here, also contended that the statute was void in that it deprived the railroad company of its property without due process of law. This contention, however, was not sustained.

In *Atlantic Coast Line Railroad Co.* v. *Georgia*, 234 U. S. 280, 58 L. ed. 1312, a statute of the State of Georgia required railroads to equip their locomotives, hauling interstate trains, with electric headlights. It was contended there, as here, that if Georgia could prescribe electric headlights, other States through which the road ran might require lights of a different sort, and the result of various adjustments would be to delay interstate traffic. The court in that case held that although applicable to interstate traffic, the act was not directed against interstate commerce but indirectly affected it, and that the State is not to be denied, because of such indirect effect, the power to protect life and property within its limits. To like effect is *Chicago, Rock Island and Pacific Railway Co.* v. *Arkansas, supra*.

While none of the cases cited or herein discussed are entirely analogous on the facts, we think those cases which consider State exercise of police power for the safety of citizens of the State, bear a stronger analogy to the case before us on the facts, than do those in which the laws or orders bore a closer identity with regulation of interstate traffic as such. It does not appear that this order was directed against interstate commerce, nor does it deny equal protection of the laws. On its face, it must be taken as not so directed, but as the exercise of the power and duty inherent in the State to protect its citizens. It purports on its face to apply to train movements within the State, and the fact that it does affect interstate shipments or cuts of cars crossing from this State into the State of Missouri, results, in our opinion, under the facts of this case, in an incidental effect only upon interstate commerce.

Counsel for appellee say that the carrying out of this order would involve so large an expense as to affect its efficiency in the discharge of its duties as an interstate

carrier. The question of expenses of labor involved and the purchase of cabooses was one of sharp dispute in the testimony. We are of the opinion that those expenses, on this record, are to be classed with those inconveniences referred to in the cases herein cited as not affecting the power of the State to impose the regulation, unless so clearly unreasonable as to be beyond State power. This record does not so indicate.

Counsel for appellee also contend that the statutes governing the powers and duties of the Commerce Commission do not give jurisdiction to enter the orders here complained of. They cite section 90 of the Utilities act, (Ill. Rev. Stat. 1941, p. 2524,) which declares the act shall not apply to interstate commerce, except when specifically so stated and in so far as permitted by paramount Federal authority. It is not claimed, as we understand the argument, that the commission may not make orders in furtherance of the police powers of the State, but that it may not enter such orders as affect interstate commerce. As hereinbefore stated, the order complained of does not purport to regulate interstate traffic and its effect upon it is but incidental. As was pointed out in *New York, New Haven and Hartford Railroad Co.* v. *New York, supra,* and *Chicago, Rock Island and Pacific Railway Co.* v. *Arkansas, supra,* and other cases herein cited, inconveniences and incidental influence on interstate commerce do not mark the measure of the power of the State to protect its citizens. Appellee's contention cannot be sustained.

That there is substantial danger to switchmen that can be avoided by these cabooses or shelter cars, seems clear. We are of the opinion that the order of the Commerce Commission lay within the police power of the State; that such power has been delegated to that commission, to protect the lives, health and welfare of those engaged in the work of switching the cars on the runs carried out by the appellee, and that it was not beyond the power of the commission to enter finding No. 35 of its order requiring cabooses to the State line for those movements which crossed the bridges, and that such regulations do not directly burden interstate commerce.

The reasons and authorities cited in determining the validity of finding and order No. 35 must apply in the main to finding and order No. 34, which requires cabooses on interyard movements within the State. Much that has already been said in the consideration of this case applies to finding and order No. 34 and need not be repeated.

It is also argued that it was error to admit the testimony of one Thomas, an investigator for the commission. This contention is without merit. By section 60 of the Public Utilities act the commission is empowered to, on its own motion, conduct investigations. It follows that the commission may hear the results of such investigations.

We are of the opinion that the order of the commission as a whole was a valid exercise of the police power and that the circuit court erred in setting that order aside. The judgment of the circuit court is reversed and the cause is remanded to that court with directions to confirm the order of the Commerce Commission.

Reversed and remanded, with directions.